(12)

No. 95-1376-CFX Title: Charles T. Robinson, Sr., Petitioner
v.
Shell Oil Company

Docketed: February 27, 1996 Court: United States Court of Appeals for the Fourth Circuit

Entry	Date	Proceedings and Orders
	Feb 27 1996	Petition for writ of certiorari filed. (Response due March 28, 1996)
	Mar 25 1996	Brief of respondent Shell Oil Company in opposition filed.
	Apr 3 1996	DISTRIBUTED. April 19, 1996
	Apr 22 1996	Petition GRANTED. SET FOR ARGUMENT November 6, 1996. **********
	May 6 1996	Order extending time to file brief of petitioner on the merits until June 21, 1996.
	Jun 20 1996	Brief amicus curiae of National Employment Lawyers Association filed.
	Jun 21 1996	Joint appendix filed.
	Jun 21 1996	Brief of petitioner Charles Robinson filed.
	Jun 21 1996	Brief amici curiae of Lawyers' Committee for Civil Rights Under Law, et al. filed.
	Jun 21 1996	Brief amici curiae of United States & the Equal Employment Opportunity Commission filed.
	Jul 22 1996	Motion of the Acting Solicitor General for leave to participate in oral argument as amicus curiae and for divided argument filed.
	Jul 25 1996	Brief of respondent Shell Oil Company filed.
	Jul 26 1996	Brief amicus curiae of Washington Legal Foundation filed.
	Jul 26 1996	Brief amicus curiae of Equal Employment Advisory Council filed.
	Aug 14 1996	Record filed.
	Aug 15 1996	Record filed.
	Aug 26 1996	Reply brief of petitioner Charles T. Robinson filed.
	Sep 10 1996	CIRCULATED.
	Sep 20 1996	Motion of the Acting Solicitor General for leave to participate in oral argument as amicus curiae and for divided argument GRANTED.
	Nov 6 1996	ARGUED.

1PP

Supreme Court, U.S.
FILED

(1)

No. 95-1876 FEB 27 1996

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In The

Supreme Court of the United States

October Term 1995

CHARLES T. ROBINSON, SR.,

Petitioner,

v.

SHELL OIL COMPANY,

Respondent.

ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

Petition for Writ of Certiorari

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102 pp

I. STATEMENT OF QUESTIONS PRESENTED

1. Does the term "employees" in Section 704(a) of Title VII of the Civil Rights Act of 1964, making it unlawful for an employer to discriminate against any of his employees or applicants for employment because they have availed themselves of Title VII's protections, include former employees?

II. PARTIES

The party to this petition is Charles T. Robinson, Sr.

The parties in the courts below were Charles T. Robinson, Sr. and Shell Oil Company.

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IV. PRIOR OPINIONS

The opinion sought to be reviewed is published at Robinson v. Shell Oil Company, 70 F.3d 325 (4th Cir. 1995)(in banc). (App. pp. A1-A29). The prior panel opinion, Robinson v. Shell Oil Company, No. 93-1562 (4th Cir. January 18, 1995), vacated on rehearing in banc, was designated for publication but is unreported. (App. pp. A30-A61). The District Court opinion, Robinson v. Shell Oil Company, No. JFM-93-28 (D.Md. April 8, 1993) is unpublished. (App. pp. A62-A63).

V. JURISDICTION

Petitioner seeks this Court's review of the judgment entered on November 29, 1995 by the United States Circuit Court of Appeals for the Fourth Circuit on rehearing in banc, by a Petition for Writ of Certiorari pursuant to the jurisdiction conferred by 28 U.S.C. § 1254(1). This Petition is timely filed because it was mailed within ninety days of November 29, 1995, the date of entry of judgment in the court below. Rules 13.4 and 29.2.

VI. STATUTE INVOLVED

42 U.S.C. § 2000e-3(a):

> It shall be an unlawful employment practice for an employer to discriminate against any of his employees or applicants for employment,. . . because he has made a charge, testified, assisted, or participated in any manner in an investigation, proceeding, or hearing under this subchapter.

VII. STATEMENT OF THE CASE

Procedural History

On January 4, 1993, petitioner Charles T.Robinson, Sr. ("Robinson") filed a pro se complaint in the District Court entitled "Complaint for Retaliation." The District Court had jurisdiction under 42 U.S.C. § 2000e-5(f)(3). The complaint asserted that Robinson was an employee of respondent Shell Oil Company ("Shell"); that on October 7, 1991, Robinson filed a charge with the Equal Employment Opportunity Commission (EEOC) charging Shell with racial discrimination; and that thereafter, "without grounds or justification, [Shell] has been providing false information and negative job references to perspective (sic) employers." The complaint also alleged that Robinson filed a second charge with the EEOC on March 10, 1992, charging

retaliation in violation of Section 704(a) of Title VII and that the EEOC had issued a Notice of Right to Sue on the second charge.

Shell moved to dismiss under Rule 12(b)(6) of the Federal Rules of Civil Procedure, asserting that Robinson's retaliation complaint was not covered by Title VII because his employment with Shell was terminated prior to the negative reference and Section 704(a) assertedly does not cover former employees. The lower court found as a fact that Robinson was not employed by Shell at the time of the negative job references and, citing Polsby v. Chase, 970 F.2d 1360 (4th Cir. 1992)[1] for the proposition that Section 704(a) does not cover former employees, granted the motion to dismiss. Robinson v. Shell Oil Company, No. JFM-93-28 (D.Md. April 8, 1993) (unpublished). (App. pp. A61-A63). Robinson noted a timely appeal to the Fourth Circuit.

A panel of the Fourth Circuit held that Section 704(a) covers former employees and ordered a reversal of the district court judgment. Robinson v. Shell Oil Company, No. 93-1562 (4th Cir. January 18, 1995)(designated for

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[1] Subsequently vacated and remanded "for further consideration in light of the position asserted by the Acting Solicitor General in his brief filed March 5, 1993." _____ U.S. _____, 113 S.Ct. 1940 (April 26, 1993).

publication but unreported). (App. pp. A30-A61).

On petition for rehearing with suggestion for rehearing in banc, the Fourth Circuit, sitting in banc (and divided 7 to 4), reversed the panel's decision and affirmed the District Court's judgment. Robinson v. Shell Oil Company, 70 F.3d 325 (4th Cir. 1995)(in banc). (App. pp. A64-A65)

Factual Summary

Charles T. Robinson, Sr. ("Robinson") was employed by Shell Oil Company ("Shell") for nearly 12 years. He was terminated in 1991. Shortly thereafter, he filed a charge with the Equal Employment Opportunity Commission (EEOC), alleging that Shell terminated him because of his race. While that charge was pending, Robinson applied for a job with another company. That company contacted Shell for an employment reference. Shell gave the second company a negative reference. Robinson then filed a second charge with the EEOC, alleging that Shell gave the second company the negative reference in retaliation for his first charge to the EEOC. He subsequently filed an action under Title VII of the Civil Rights Act of 1964, ("the Act"), 42 U.S.C. § 2000e et seq., invoking the anti-retaliation provision in Section 704(a), 42 U.S.C. § 2000e-3(a). (App. pp. A31-A32).

ARGUMENT

The Circuit Courts of Appeal Are Split In Their Interpretation Of This Important Statute

Title VII of the Civil Rights Act 1964 ("the Act"), 42 U.S.C. § 2000e et seq., includes an anti-retaliation provision in Section 704(a). Section 704(a) provides

> It shall be an unlawful employment practice for an employer to discriminate against any of his employees or applicants for employment, . . . because he has made a charge, testified, assisted, or participated in any manner in an investigation, proceeding, or hearing under this subchapter.

42 U.S.C. § 2000e-3(a)(1982).

"Employee" is defined in the Act as "an individual employed by an employer." 42 U.S.C. § 2000e(f). Nevertheless, this section has been construed by seven Circuits to cover former employees. Charlton v. Parmus Bd. of Educ., 25 F.3d 194, 198-200 (3d Cir. 1994), cert. denied, _____ U.S. _____, 115 S.Ct. 590, 130 L.Ed.2d 503 (1994); Bailey v. USX Corp., 850 F.2d 1506 (11th Cir. 1988);

Sherman v. Burke Contracting, Inc., 891 F.2d 1527 (11th Cir.), cert. denied, 498 U.S. 943, 111 S.Ct. 353, 112 L.Ed.2d 317 (1990); Pantchenko v. C.B. Dolge Co., Inc., 581 F.2d 1052 (2d Cir. 1978); Rutherford v. American Bank of Commerce, 565 F.2d 1162 (10th Cir. 1977); Passer v. American Chemical Soc'y, 935 F.2d 322, 331 (D.C.Cir. 1991)(holding "employees" under Age Discrimination in Employment Act's (ADEA) parallel provision includes former employees so long as the alleged discrimination is related to or arises out of the employment relationship); EEOC v. Cosmair, Inc., L'Oreal Hair Care Div., 821 F.2d 1085, 1088 (5th Cir. 1987)(holding "employees" under ADEA's parallel provision includes former employees so long as the alleged discrimination is related to or arises out of the employment relationship); O'Brien v. Sky Chefs, Inc., 670 F.2d 864, 869 (9th Cir. 1982), overruled on other grounds by Antonio v. Wards Cove Packing Co., 810 F.2d 1477, 1481-82 (9th Cir. 1987)(en banc); Dunlop v. Carriage Carpet Co., 548 F.2d 139, 142 (6th Cir. 1977)(holding "employee" under Fair Labor Standards Act's anti-retaliation provision includes former employees). Cf. EEOC v. J. M. Huber Co., 927 F.2d 1322, 1331 (5th Cir. 1991).

The Seventh Circuit is the only circuit other than the Fourth Circuit that has refused to extend the protection of Section 704(a) to former employees.

Reed v. Shepard, 939 F.2d 484 (7th Cir. 1991).[2] It is in the public interest for this Honorable Court to resolve the split among the Circuits.

The Term "Employee" As Used In Section 704(a) Is Ambiguous, Requiring The Courts To Construe It To Effectuate The Purposes Of The Act

The task of construing a statute begins with the language of the statute itself. American Tobacco Co. v. Patterson, 456 U.S. 63, 102 S.Ct. 1534, 71 L.Ed.2d 748 (1982). However, it is not always the case that this task ends with the literal language of the statute.

> As Learned Hand wisely observed, "It is a commonplace that a literal interpretation of the words of a statute is not always a safe guide to its meaning."

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[2] It is not clear that Reed holds that former employees are never entitled to Section 704(a)'s protection. The Court stated that "it is an employee's discharge or other employment impairment that evidences actionable retaliation, and not events subsequent to and unrelated to his employment." Reed, 939 F.2d at 492-93 (emphasis added). Thus, Reed apparently would extend § 704(a)'s protection to a former employee where the alleged retaliation was an "employment impairment" that was "related" to his employment.

Pantchenko v. C.B. Dolge Co., Inc., supra, 581 F.2d at 1055 (citing Peter Pan Fabrics, Inc. v. Martin Weiner Corp., 274 F.2d 487, 489 (2d Cir. 1960). The letter of the law does not always control.

> It is a familiar rule that a thing may be within the letter of the statute and yet not within the statute, because not within its spirit nor within the intention of its makers.

United Steelworkers of America, AFL-CIO-CLC v. Weber, 443 U.S. 193, 201, 99 S.Ct. 2721, 2726, 61 L.Ed.2d 480 (1979). A court charged with interpreting a statute is required to look beyond the plain language when that language is ambiguous, or when reliance on the literal language of the statute would defeat the purpose of the statute. Even though the language of the statute is unambiguous, a court still must interpret the words of a Federal statute in the light of the purposes that Congress sought to serve.

> It is a well-established canon of statutory construction that a court should go beyond the literal language of a statute if reliance on that language would defeat the plain purpose of the statute:

> "The general words used in the clause ..., taken by themselves, and literally construed, without regard to the object in view, would seem to sanction the claim of the plaintiff. But this mode of expounding a statute has never been adopted by any enlightened tribunal -- because it is evident that in many cases it would defeat the object which the Legislature intended to accomplish. And it is well settled that, in interpreting a statute, a court will look not merely to a particular clause in which general words may be used, but will take in connection with it the whole statute ... and the objects and policy of the law...."

Bob Jones University v. United States, 461 U.S. 574, 586, 103 S.Ct. 2017, 2025, 76 L.Ed.2d 157 (1983)(emphasis in the original).

Thus, in determining the meaning of a statute, the court looks not only to the particular statutory language but also to the design of the statute as a whole and to its object and policy. Crandon v. United States, 494 U.S. 152, 110 S.Ct. 997, 108 L.Ed.2d 132 (1989); Gonzalez v. Young, 441 U.S. 600, 99 S.Ct.

1905, 60 L.Ed.2d 508 (1979). In the words of Judge Learned Hand,

> There is no surer guide in the interpretation of a statue than its purpose when that is sufficiently disclosed; nor any surer mark of over solicitude for the letter than to wince at carrying out that purpose because the words do not formally quite match it.

Federal Deposit Ins. Corp. v. Tremaine, 133 F.2d 827, 830 (2d Cir. 1943). The plain meaning rule should not be applied to produce a result which is actually inconsistent with the policies underlying the statute. Bailey v. USX Corp., supra, 850 F.2d at 1509.

When construing a part of a statute, courts must look to the surrounding statutory context for interpretation. Courts do not construe statutory phrases in isolation; they read statutes as a whole, ascertain the legislative intent, and give effect to that intent. Food Town Stores, Inc. v. E.E.O.C., 708 F.2d 920 (4th Cir. 1983). A court should, if possible, construe statutes harmoniously; this is especially true if the statutes deal with the same subject matter, even if an apparent conflict exists. Anderson v. Federal Deposit Ins. Corp., 918 F.2d 1139, rehearing denied (4th Cir. 1990). When a statute is part of a larger act,

the starting point for ascertaining the legislative intent is to look to other sections of the act that are in pari materia with the statute under review. United States v. Morison, 844 F.2d 1057 (4th Cir.), cert. denied 488 U.S. 908, 109 S.Ct. 259, 102 L.Ed.2d 247 (1988).

A Literal Constriction Of "Employee" Defeats The Plain Purpose Of The Statute

These principles of statutory construction apply in this case. The language of the Section is ambiguous. It speaks of "employees." The word can well be used to mean former employees. "[U]se of the term "employee" in referring to a former employee, while colloquial, is not inappropriate." Pantchenko v. C.B. Dolge Co., Inc., supra, 581 F.2d at 1055. "The term 'employee' includes a former employee as long as the alleged discrimination is related to or arises out of the employment relationship." E.E.O.C. v. Cosmair, Inc., 821 F.2d 1085, 1089 (5th Cir. 1987). Because the language of the statute is ambiguous, the court must look to the purpose of the statute for its interpretation.

The purpose of Section 704(a) is to give assurance to persons contemplating making a charge, testifying, assisting, or participating in an investigation, proceeding, or hearing under the Act, that they will not suffer retaliation from the employer. The Section is

intended to promote the resolution of employment discrimination disputes through the mechanisms established by Title VII. These mechanisms cannot operate fully if aggrieved persons and potential witnesses are inhibited from making charges, cooperating with EEOC investigators, testifying in hearings or otherwise participating in proceedings under the Act. Title VII would be an empty shell if aggrieved persons could only resort to its remedies on pain of retaliation from the employer.

The Holding Below Leads To Grossly Absurd Results

Even if "employee" be viewed as unambiguous, the Section must in any event be interpreted so as to give effect to its purpose. Bob Jones University v. United States, supra. If Section 704(a) is construed to not cover former employees, it can produce absurd results. Consider a hypothetical. An employee of a company files a charge with the EEOC charging the company with discriminatory denial of promotions. The employee subsequently tells the company: "I've had enough. I'm quitting. Friday is my last day. I've contacted the XYZ Company and they're interested in hiring me. Please send them a recommendation." The employee's boss sends the XYZ Company an unfavorable recommendation. But assume that Section 704(a) does not cover former

employees. If the boss sends the recommendation out on Thursday, the employee is protected by Section 704(a) but if the boss waits until the following Monday to send out the recommendation, the employee would not be protected by Section 704(a)!

Statutes should be construed to avoid absurd results. Griffin v. Oceanic Contractors, Inc., 458 U.S. 654, 102 S.Ct. 3245, 73 L.Ed.2d 293 (1982). Whether our hypothetical employee is protected by Section 704(a) should not depend on whether his employer makes the unfavorable recommendation on Thursday or Monday.

Nor should the result depend on whether the employee makes the request for a recommendation before or after he quits. The recommendation is directly related to the employee's employment. It arises out of that employment relationship.

Consider another hypothetical. An employee files a charge with the EEOC. Subsequently, his job is abolished. In the past, the employer has paid severance pay to some employees when their employment was terminated. He does not pay severance pay to this employee. The employee charges the employer with failing to pay him severance pay in retaliation for his filing a charge with the EEOC. Should coverage under Section 704(a) depend on whether the failure to

pay severance pay occurred before or after the termination of employment?

These "hypotheticals" in fact illustrate real-life issues that commonly arise under Section 704(a). Charges of retaliation brought by former employees commonly involve actions taken by employers after the employment relationship has ended but which are related to and arise out of the prior employment relationship. In Sherman v. Burke Contracting, Inc., supra, the plaintiff alleged that his former employer persuaded his subsequent employer to fire him in retaliation for a complaint that the plaintiff made to the EEOC alleging that he was fired on account of his race. In Shehadeh v. Chesapeake & Potomac Tel. Co., 595 F.2d 711(D.C. Cir. 1978) the plaintiff alleged that her former employer discouraged prospective employers from hiring her by giving them adverse references. She alleged that the adverse references were given in retaliation for an earlier charge of discrimination she made against the former employer. In Pantchenko, supra, the plaintiff alleged that after she left her employment her former employer refused to give her a letter of recommendation and made disparaging and untrue statements about her to prospective employers in retaliation for her filing a charge of discrimination with the EEOC. The Second Circuit held that proof of a refusal to provide an

"employee" with a reference in retaliation for the filing of charges with the EEOC would amount to discrimination of the type prohibited by Section 2000e-3 of the Act. 581 F.2d at 1055. There is no good reason why the same refusal should not be a violation of the Act if the employee requests the reference after the employment relationship ends.

Title VII is remedial legislation, intended to afford minorities and women the opportunity to be hired on basis of merit and to eliminate discrimination in employment based on race, color, religion, sex, or national origin. Polsby, 970 F.2d at 1365 - 66. A statute which is remedial in nature should be liberally construed. See Mitchell v. Lublin, McGaughy & Asso., 358 U.S. 207, 211, 79 S.Ct. 260, 3 L.Ed.2d 243 (1959). In E.E.O.C. v. Metzger, 824 F.Supp. 1 (D.D.C. 1993), the EEOC sued an individual's former employer alleging that the defendant improperly informed the individual's subsequent employer of a discrimination complaint she filed against the defendant with the EEOC. The EEOC contended that the notification caused the subsequent employer to discharge the individual and was an illegal act of retaliation under Title VII. Reasoning that "strict and narrow interpretation of the word 'employee' to exclude former employees would undercut the obvious remedial purposes of Tile

VII", the court held that the complaint stated a cause of action under Title VII. 824 F.Supp. at 2. To construe Section 704(a) to exclude former employees gives the statute a narrow construction totally at odds with the remedial purposes of the Act.

Section 704(a) does not stand in isolation. Section 704(a) must be read in context with the entire Civil Rights Act of 1964 as amended by the Civil rights Act of 1991. The Act protects past, present and future employees. Section 703(a)(1) of the Act protects "any individual" from discrimination with respect to his "privileges of employment."[3] Because it is not limited to present employees or applicants, Section 703(a)(1) covers former employees. See Wetzel v. Liberty Mut. Ins. Co., 508 F.2d 239 (3d Cir.), cert. denied, 421 U.S. 1011, 95 S.Ct. 2415, 44

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[3] Section 703(a)(1) provides in pertinent part:

> (a) It shall be an unlawful employment practice for an employer--
> (1) to fail or refuse to hire or to discharge any individual, or otherwise to discriminate against any individual with respect to his compensation, terms, conditions, or privileges of employment, because of such individual's race, color, religion, sex, or national origin.

42 U.S.C. § 2000e-2(a)(1)(emphasis supplied).

L.Ed.2d 679 (1975); Hackett v. McGuire Bros., 445 F.2d 442 (3d Cir. 1971). The Act provides remedies for persons other than direct employees. "[T]he proscriptions contemplated by Section 703(a)(1) reach beyond the immediate employment relationship." Sibley Memorial Hosp. v. Wilson, 488 F.2d 1338, at 1341, n. 47, (D.C.Cir. 1973).

The decision below ignores the Fourth Circuit's recognition that a court's task in interpreting particular sections of statutes is

> to give them the most harmonious, comprehensive meaning possible in light of the legislative policy and purpose.

U. S. Army Engineer Center v. Federal Labor Relations Authority, 762 F.2d 409, 416 (4th Cir. 1985). To construe Section 703(a)(1) to cover past employees while construing Section 704(a) to exclude them fails to give the Act the "most harmonious, comprehensive meaning" called for.

The Construction Given Other Employment Related Anti-Discrimination Statutes Supports Coverage of_Former Employees Under Section 704(a)

Passer v. American Chemical Soc., supra, was an action under a provision of the Age Discrimination in Employment Act making it

> unlawful for an employer to discriminate against any of his employees or applicants for employment ... because such individual ... has opposed any practice made unlawful by this section, or because such individual ... has made a charge, testified, assisted, or participated in any manner in an investigation, proceeding, or litigation under this chapter.

29 U.S.C. § 623(d)(1988). This provision is parallel to Section 704(a). The language is identical to that of Section 704(a). By its literal language, § 623(d) protects only "employees or applicants for employment." Dr. Passer sued the American Chemical Society because, after he left the Society's employ, the Society canceled a major public symposium honoring him because he filed discrimination charges against the Society. The court held that former

employees were covered by § 623(d) "as long as the alleged discrimination is related to or arises out of the employment relationship." Passer, 935 F.2d at 330.

> To read the statute otherwise would be to deny protection to any person who has suffered discharge or termination due to unlawful discrimination. Obviously, Congress could not have intended such an absurd result.

Passer, 935 F.2d at 331.

The coverage of an anti-retaliation provision under the Fair Labor Standards Act, 29 U.S.C. § 201 et seq. was at issue in Dunlop v. Carriage Carpet Co., supra. Section 15 of the FLSA reads in part:

> [I]t shall be unlawful for any person --
>
> * * * * *
>
> (3) to discharge or in any other manner discriminate against any employee because such employee has filed any complaint or instituted or caused to be instituted any proceeding under or related to this Act, or has testified or

> is about to testify in any such proceeding . . . .

29 U.S.C. § 215 (emphasis supplied). In Dunlop, an employee of the Carriage Carpet Company filed a complaint with the Department of Labor charging the company with failure to pay overtime rates as required by the FLSA. The employee later quit the company. Still later he applied for employment with another company. Upon inquiry, the Carriage Company informed the second employer that the employee had previously filed a complaint with the Labor Department and the second company turned down Carriage's former employee's application for employment. The Department of Labor brought suit against the Carriage Company for violating 29 U.S.C. § 215(a)(3) by discriminating against its former employee by disclosing to the prospective employer that he had filed a complaint against it under the FLSA. The Sixth Circuit held that a former employee was protected against discrimination by his former employer under 29 U.S.C. § 215, even though the statute did not refer to "former employees."

The Dunlop court reasoned that it must "look to the legislative purpose of the [act] and follow that purpose even though a literal reading of the language used would suggest a different conclusion; ... practical considerations, and not technical conceptions, guide us

in determining coverage under the [act]." 548 F.2d at 144.

The Holding Below Undercuts Enforcement of Title VII

The anti-retaliation provision is vital to the Act. The enforcement of Title VII depends upon employee cooperation. See EEOC v. Board of Governors, 957 F.2d 424, 431 (7th Cir.)("the work of the EEOC . . . depends upon employee cooperation), cert. denied, ____ U.S. ____, 113 S.Ct. 299 (1992). To assure effective enforcement of Title VII, Congress prohibited retaliation so that "employees will not fear to assert their substantive rights." Ross v. Communications Satellite Corp., 759 F.2d 355, 366 (4th Cir. 1985).

This Court noted that in Labor Board v. Hearst Publications, 322 U.S. 111, 124, 64 S.Ct. 851, 857, 88 L.Ed. 1170 (1944), the Supreme Court explained that the word "employee" in social legislation such as the National Labor Relations Act and the Fair Labor Standards Act

> . . . derives meaning from the context of that statute, which "must be read in the light of the mischief to be corrected and the end to be attained."

Dunlop, 548 F.2d at 144 - 45.

The "mischief to be corrected and the end to be attained" under Section 704(a) are a sure guide to the interpretation of that Section. Just as was pointed out by the Dunlop court in the context of the Fair Labor Standards Act, Congress did not seek to secure compliance with Title VII through continuing detailed federal supervision or inspection of the employment practices of employers. Rather it chose to rely on complaints to the EEOC from employees seeking to vindicate rights claimed to have been denied. The EEOC attempts to achieve compliance with the Act through the "preferred" methods of "cooperation and voluntary compliance." Alexander v. Gardner-Denver Co., 415 U.S. 36, 44, 94 S.Ct. 1011, 1017, 39 L.Ed.2d 147 (1974). Plainly, effective enforcement of Title VII can only be expected if employees feel free to file charges of discrimination and participate in proceedings under the Act. The anti-retaliation provisions of Section 704(a) are designed to serve this end. Section 704(a) is intended to foster a climate in which compliance with the substantive provisions of Title VII would be enhanced. Section 704(a) fosters that climate by discouraging employers from retaliating against employees who file charges of discrimination against them. Applying Section 704(a) to cover former employees further fosters that climate.

By its terms, Section 704(a) protects applicants for employment and current employees from retaliation for taking such actions. Former employees who contemplate filing a charge of discrimination or who contemplate testifying, assisting, or participating in proceedings under the Act need assurance no less than applicants and current employees that they will not suffer retaliation for doing such things. The termination of the employment relation with the former employer does not strip that employer of the power to retaliate against such a former employee. It is a reality of life in the workplace that former employees can be hurt by their former employer. A former employer is solidly in position to impede a prior employee's reentry into the job market.

> [I]t is a fact of business life that employers almost invariably require prospective employees to provide the names of their previous employers as references when applying for a job.

Shehadeh v. Chesapeake & Potomac Tel. Co., supra, 595 F.2d at 722. The former employer can give prospective employers unfavorable recommendations. Id. He can brand the former employee as an "informer." Rutherford v. American Bank of Commerce, supra, 565 F.2d at 1166.

When false reports of a former employee's suitability for employment are distributed for discriminatory reasons, disparate treatment of the affected employee vis-a-vis other former employees not so maligned is apparent. Shehadeh, supra, note 43, 595 F.2d at 720. Merely telling the prospective employer that the former employee has filed a charge against the prior employer can impede the former employee's ability to be hired by the prospective employer. See Rutherford, supra. Section 704(a) is intended to protect against such retaliation. Rutherford, Shedadeh, Pantchenko. Former employees are as much in need of protection against retaliation as current employees. The construction given to Section 704(a) by the Court below undercuts the enforcement of Title VII. To avoid undercutting that enforcement, Section 704(a) must be construed to cover former employees.

CONCLUSION

Title VII is of great public importance but the Circuit Courts of Appeal are split in their holdings on the question of whether the anti-retaliation provision of the Act protects former employees. The holding below is in the minority. It is in the public interest for this Honorable Court to resolve that split so as to provide uniformity of construction of this important statute.

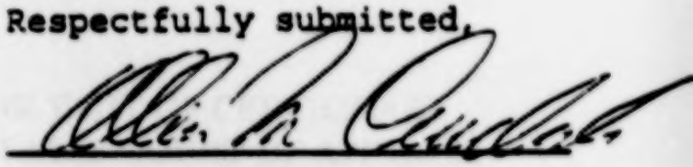
The term "employee" as used in Section 704(a) is ambiguous, requiring the courts to construe the term to effectuate the purposes of Title VII. Construing the term to include former employees carries out the manifest Congressional purpose in enacting Title VII. A literal construction defeats the purpose of the Act.

A literal construction leads to grossly absurd results.

The holding below undercuts enforcement of Title VII.

This Honorable Court should grant certiorari and reverse the holding below.

Respectfully submitted,



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No. _____

In The

Supreme Court of the United States

October Term 1995

CHARLES T. ROBINSON, SR.,

Petitioner,

v.

SHELL OIL COMPANY,

Respondent.

ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

Appendix to Petition for Writ of Certiorari

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PUBLISHED

UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

CHARLES T. ROBINSON, SR.,
Plaintiff-Appellant,

EQUAL EMPLOYMENT OPPORTUNITY COMMISSION,
Amicus Curiae,

v.

SHELL OIL COMPANY,
Defendant-Appellee.

No. 93-1562

Appealfrom the United States
District Court
for the District of Maryland,
at Baltimore.
J. Frederick Motz, Chief District Judge.
(CA-93-28-JFM)

Argued: September 26, 1995

Decided: November 29, 1995

Entered: November 29, 1995

Before ERVIN, Chief Judge, and RUSSELL, WIDENER, HALL, MURNAGHAN, WILKINS, NIEMEYER, HAMILTON, LUTTIG, WILLIAMS, and MICHAEL, Circuit Judges.

Affirmed by published opinion. Judge Hamilton wrote the opinion, in which Judges Russell, Widener, Wilkins,

Niemeyer, Luttig, and Williams joined. Judge Hall wrote a dissenting opinion, in which Chief Judge Ervin and Judge Michael joined. Judge Murnaghan also wrote a dissenting opinion, in which Chief Judge Ervin joined. Judge Wilkinson and Judge Motz did not participate in this case.

COUNSEL

ARGUED: Allen Martin Lenchek, Washington, D.C., for Appellant. John Foster Suhre, EQUAL EMPLOYMENT OPPORTUNITY COMMISSION, Washington, D.C., for Amicus Curiae. Lawrence Christopher Butler, Houston, Texas, for Appellee. **ON BRIEF:** James R. Neely, Jr., Deputy General Counsel, Gwendolyn Young Reams, Associate General Counsel, Vincent J. Blackwood, Assistant General Counsel, EQUAL EMPLOYMENT OPPORTUNITY COMMISSION, Washington, D.C., for Amicus Curiae.

OPINION

HAMILTON, Circuit Judge:

Section 704(a) of Title VII of the Civil Rights Act of 1964 (commonly referred to as Title VII's anti-retaliation provision) makes it unlawful "for an employer to discriminate against any of his employees or applicants for employment" who have either availed themselves of Title VII's protections or assisted others in so doing. *See* 42

U.S.C.A. §2000e-3(a) (West 1994). Subsection 2000e(f) of Title VII defines "employee" as "an individual employed by an employer." *See* 42 U.S.C.A. §2000e(f) (West 1994). The issue before the *en banc* court is whether the term "employees" includes former employees. We conclude that it does not.

I.

Shell Oil Company (Shell) terminated Charles T. Robinson (Robinson) from its employment in 1991. Shortly thereafter, Robinson filed a charge with the Equal Employment opportunity Commission (EEOC), alleging that Shell had terminated him because of his race. While that charge was pending, Robinson applied for a job with another company that contacted Shell, as Robinson's former employer, for an employment reference. According to Robinson, Shell gave him a negative reference. Robinson attributed the negative reference to Shell's intention to retaliate against him for filing the EEOC charge.

Robinson subsequently filed this action. Robinson's complaint alleged that after he filed a charge of race discrimination against Shell with the EEOC, Shell provided "false information and negative job references to perspective [sic] employers." (J.A. 6). The complaint further alleged that such action violated the anti-retaliation

provision of Title VII of the Civil Rights Act of 1964, *see* 42 U.S.C.A. § 2000e3(a) (West 1994).

Contending the anti-retaliation provision of Title VII does not provide former employees a cause of action against their former employers for post-employment retaliation, Shell moved to dismiss the complaint on the ground that it failed to state a claim upon which relief could be granted, *see* Fed. R. Civ. P. 12(b)(6). In support of its motion, Shell cited *Polsby v. Chase*, 970 F.2d 1360 (4th Cir. 1992), which held that the anti-retaliation provision of Title VII does not apply to former employees. Upon Shell's motion, the district court dismissed the complaint. Subsequently, the Supreme Court summarily vacated *Polsby*. *See Polsby v. Shalala*, 113 S. Ct. 1940 (1993).[1]

[1] The Supreme Court vacated this court's judgment in *Polsby* and remanded the case to this court "for further consideration in light of the position asserted by the Acting Solicitor General in his brief for the United States filed March 5, 1993." *Polsby v. Shalala*, 113 S. Ct. 1940 (1993). Because the Supreme Court vacated *Polsby* on this ground, no meaningful argument can be made that the Supreme Court in any way addressed the merits of the present issue or concluded *Polsby* to be legally incorrect. *See United States Dep't of Health & Human Servs. v. Federal Labor Relations Auth.*, 983 F.2d 578, 581-82 & n.2 (4th Cir. 1992) (adopting reasoning of vacated opinion where vacatur did not address the issue). In light of the Supreme Court's action, we write on a clean slate.

Robinson appealed to this court. A divided panel of this court reversed the judgment of the district court, *see Robinson v. Shell Oil* Co., No. 93-1562 (4th Cir. January 18, 1995) (designated for publication, but not reported), but, on Shell's suggestion, we vacated the panel decision and reheard the case *en banc*. We now affirm.

II.

Section 704(a) of Title VII of the Civil Rights Act of 1964 provides in pertinent part:

> (a) It shall be an unlawful employment practice for an *employer* to discriminate against any of his *employees or applicants for employment* . . . because he has made a charge, testified, assisted, or participated in any manner in an investigation, proceeding, or hearing under this subchapter.

42 U.S.C.A. §2000e-3(a) (West 1994) (emphasis added). In reviewing the propriety of the district court's dismissal of Robinson's complaint, our task is to apply Title VII's anti-retaliation provision to the facts before us. The dispute regarding the correct application centers on the scope of the

term "employees." Robinson asserts the term "employees" includes former, as well as current, employees. According to Robinson, this interpretation is favorable because it gives effect to the remedial purpose of Title VII to eradicate illegal discrimination in the work place. Conversely, relying on the plain language of the statute, Shell asserts that the term "employees" includes only current employees.

A.

Initially, it is helpful to lay out the all too familiar framework of statutory interpretation. Courts are charged with the duty to apply the law that Congress enacted. Accordingly, "[w]e begin, as we must, by examining the statutory language, bearing in mind that we should give effect to the legislative will as expressed in the language." *United States v. Murphy*, 35 F.3d 143, 145 (4th Cir. 1994), *cert. denied*, 115 S. Ct. 954 (1995) (citing *K-Mart Corp. v. Cartier, Inc.*, 486 U.S. 281, 291 (1988)). In examining statutory language, generally, words are given their common usage, and '[c]ourts are not free to read into the language what is not there, but rather should apply the statute as written." *Id.* We must acknowledge that the duty of this court is to adhere faithfully to the rules of statutory interpretation rather than to "exercise[]

a high degree of ingenuity in the effort to find justification for wrenching from the words of a statute a meaning which literally they did not bear in order to escape consequences thought to be absurd or to entail great hardship." *Crooks v. Harrelson*, 282 U.S. 55, 60 (1930).

If a statute defines a term in its definitional section, then that definition controls the meaning of the term wherever it appears in the statute. *See Florida Dep't of Banking & Fin. v. Board of Governors of Fed. Reserve Sys.*, 800 F.2d 1534, 1536 (11th Cir. 1986) (definition of term in definitional section of statute controls construction wherever that term appears throughout the statute), *cert. denied*, 481 U.S. 1013 (1987). As a general rule "[a] definition which declares what a term means . . . excludes any meaning that is not stated." 2A George Sutherland, *Statutes and Statutory Construction* §47.07, at 152 (5th ed. 1992) (emphasis added).

Our inquiry must cease if the statutory language is unambiguous and "'the statutory scheme is coherent and consistent.'" *Murphy*, 35 F.3d at 145 (quoting *United States v. Ron Pair Enters., Inc.*, 489 U.S. 235, 240-41 (1989)). In other words, if the statutory language "'is plain and admits of no more than one meaning, the duty of interpretation does not arise, and the rules which are to aid doubtful meanings

need no discussion.'" Id. (quoting *Caminetti v. United States*, 242 U.S. 470, 485 (1917)). "The language being facially clear and 'within the constitutional authority of the law-making body which passed it, the sole function of the courts is to enforce it according to its terms.'" Id. (quoting *Caminetti*, 242 U.S. at 485).

There are, however, rare and narrow exceptions when courts may stray beyond the plain language of unambiguous statutes. Id. One such circumstance arises if the literal application of statutory language would lead to an absurd result. *See Crooks*, 282 U.S. at 59-60. Only, however, "under rare and exceptional circumstances" do courts find that literal application of statutory language would lead to an absurd result. Id. at 60. In such cases, the absurdity "must be so gross as to shock the general moral or common sense. And, there must be something to make plain [Congress' intent] that the letter of the statute is not to prevail." *Id.* (internal citations omitted).

Another circumstance permitting courts to look beyond the plain meaning of unambiguous statutory language arises if literal application of the statutory language would produce a result demonstrably at odds with the intent of Congress; in such cases, the intent of Congress rather than the strict language controls. *See Ron Pair Enters., Inc.*, 489

U.S. at 242 ("The plain meaning of legislation should be conclusive, except in the rare cases [in which] the literal application of a statute will produce a result demonstrably at odds with the intentions of its drafters. In such cases, the intention of the drafters, rather than the strict language controls.") (internal quotation marks and citation omitted). To come within the ambit of this exception, however, the contrary intent must have been clearly expressed by the legislative body. *See Russello v. United States*, 464 U.S. 16, 20 (1983). Most importantly, in the absence of expressed Congressional intent, we must assume that Congress intended to convey the language's ordinary meaning. *See United States v. Goldberger & Dubin, P. C.*, 935 F.2d 501, 506 (2d Cir. 1991) ("The words of a statute should be given their normal meaning and effect in absence of showing that some other meaning was intended."); *United States v. Stokley*, 881 F.2d 114, 116 (4th Cir. 1989) ("In the absence of a contrary indication, the court must assume the drafters of a statute intended to convey the ordinary meaning attached to the language.").

If the plain language of the statute is ambiguous, then a court may look beyond the plain language to the legislative history for guidance. *See United States v. Southern Management Corp.*, 955 F.2d 914, 920 (4th Cir. 1992)

(recognizing that courts should look to other sources of legislative intent if the statutory language does not convey a clear meaning).

Observant of this well-established analytical framework for statutory analysis, we now turn to the statute at hand.

B.

In deciding whether Title VII's Anti-retaliation provision provides a former employee a cause of action against his former employer for post-employment retaliation, we find the statutory language unambiguously answers the question "no." First, we look at the language Congress used: "It shall be an unlawful employment practice for an *employer* to discriminate against any of his *employees or applicants for employment*...because he has made a charge, testified, assisted, or participated in any manner in an investigation, proceeding, or hearing under this subchapter." 42 U.S.C.A. §2000e-3(a) (West 1994) (emphasis added). Subsection 2000e(f) defines "employee" for purposes of all provisions of Title VII as "an individual employed by an employer." 42 U.S.C.A. §2000e(f) (West 1994). Read in *pari materia*, these sections of Title VII provide a remedy for acts of retaliation to *employees* and *applicants for employment* who have either

availed themselves of Title VII's protections or assisted others in so doing.

Although subsection 2000e(f) defines the term "employee" as "an individual employed by an employer," Robinson contends, rather remarkably, that the term "employees" as used in Title VII's anti-retaliation provision means "former employees." His contention is legally untenable. Title VII defines "employee" for purposes of all provisions of Title VII; thus, that definition controls the meaning of "employee" wherever it appears throughout the statute. *See Florida Dep't of Banking & Fin.*, 800 F.2d at 1536. Because Title VII *does not* define "employee" as an individual *no longer employed* by an employer, then, under the rules of statutory construction, that meaning is excluded as a meaning from the term "employee." *See Statues and Statutory Construction* §47.07, at 152. We are simply prohibited from reading into the clear language of the definition of "employee" that which Congress did not include. *See Murphy*, 35 F.3d at 145. If Congress intended Title VII to remedy discrimination beyond the employment relationship, then it could have easily done so by including "former employee" when defining the term "employee."

Neither is the language comprising Title VII's definition of the term "employee" ("an individual employed by an employer," 42 U.S.C.A. § 2000e(f) (West

1994)), ambiguous. The rules of statutory construction require us to give the words Congress used to define "employee" their common usage. *See Murphy*, 35 F.3d at 145. The term "employed" as used in subsection 2000e(f) is commonly used to mean "performing work under an employer-employee relationship." *Black's Law Dictionary* 525 (6th ed. 1990). Certainly, the term "employed" is not commonly used to mean "no longer performing work under an employer-employee relationship." Furthermore, "employer" as used in subsection 2000e(f) is commonly used to mean "one who employs the services of others." *Id.* Again, no meaningful argument can be made that the term "employer" is commonly used to mean "one who no longer employs the services of others." Accordingly, we reject any notion that the language in Title VII's definition of the term "employee" is ambiguous.

Because the language in Title VII's definition of "employee" is not ambiguous, any attempt to resort to legislative history is foreclosed. *See Murphy*, 35 F.3d at 145. Therefore, this court is bound to apply literally the term "employees" in Title VII's anti-retaliation provision as defined by Congress in subsection 2000e(f) without examination of any other sources of legislative intent, unless such application falls within one of the exceptions to literal application. *Id.*

Here, neither exception applies because both require Congress to have made plain that it intended a result different than literal application would produce. Indeed, the absence of any language in Title VII's anti-retaliation provision referring to former employees is strong evidence that Congress did not intend Title VII to protect former employees. Additionally, Congress' inclusion of "applicants for employment" as persons *distinct* from "employees," coupled with its failure to include "former employees" is strong evidence of Congressional intent that the term "employees" in Title VII's anti-retaliation provision does not include former employees. With no applicable exception to prevent literal application of the words Congress chose, we hold, as we must, that the meaning of the term "employees" in Title VlI's anti-retaliation provision does not include former employees as urged by Robinson. Because "former employees" are not included in the statutory language, Title VII's anti-retaliation provision does not protect them. Given that the statute does not protect former employees, Robinson has no claim under its aegis.

C.

Although the rules of statutory construction do not require us to proceed further, several other important

considerations support our interpretation of the anti-retaliation provision. First, the types of practices that Title VII forbids strongly point toward the scope of its anti-retaliation provision not extending beyond the employment relationship. The types of practices that Title VII forbids are particularly related to *employment*, *not* post-employment relationships. For example, Title VII specifically defines "unlawful employment practice" in part as the failure or refusal "to hire or to discharge any individual, or otherwise to discriminate against any individual with respect to his compensation, terms, conditions, or privileges of employment, because of such individual's race, color, religion, sex, or national origin." 42 U.S.C.A. §2000e-2(a)(1) (West 1994). This definition comprises discrimination with respect to certain aspects of employment, and does not redress discriminatory practices *after* the employment relationship has terminated.

Second, Title VII's anti-retaliation provision does not redress post-employment retaliation because the second element of a *prima facie* case of retaliation under Title VII requires the employee to suffer an "adverse employment action" that necessarily entails conduct that occurs during the employment relationship. *See Williams v. Cerberonics, Inc.*, 871 F.2d 452, 457 (4th Cir. 1989); *see also Reed v. Shepard*, 939

F.2d 484, 492-93 (7th Cir. 1991). Adverse employment action necessarily requires that the adverse action taken by the employer must be in relation to its own act of *employing* the employee bringing the charge. Consequently, any adverse action taken after the employment relationship has terminated cannot be actionable under Title VII. Recognizing this point, the *Reed* court stated that because "the alleged retaliatory activities took place *after* the termination of Reed's employment" those activities were "not an adverse employment action." *Reed*, 939 F.2d at 492-93.

Given the types of practices that Title VII forbids, it follows that Congress drew the line defining the scope of Title VII at its most logical place--the termination of the employment relationship. Title VII does not redress discriminatory practices, however reprehensible, which occur after the employment relationship has ended. Rather, Congress specifically enacted the anti-retaliation provision so that applicants/employees falling victim to discrimination during their applications for employment and/or employment would be able to invoke Title VII to protect their rights without fear of retaliation.

D.

We are not unmindful that our holding is embraced by only one circuit court[2] and at odds with the majority of circuit courts that have addressed this question.[3] In concluding that Title VII's anti-retaliation provision and other parallel statutes reach post-employment retaliation, the decisions in the majority have interpreted the term

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[2] *See Reed*, 939 F.2d at 492-93.

[3] *See Charlton v. Paramus Bd. of Educ.*, 25 F.3d 194, 198-200 (3d Cir. 1994), *cert. denied*, *115 S.* Ct. 590 (1994); *Passer v. American Chem. Soc'y.*, 935 F.2d 322, 331 (D.C. Cir. 1991) (holding "employees" under Age Discrimination in Employment Act's (ADEA) parallel retaliation provision includes former employees as long as the alleged discrimination is related to or arises out of the employment relationship); *Bailey v. USX Corp.*, 850 F.2d 1506, 1509 (11th Cir. 1988); *EEOC v. Cosmair, Inc., L'oreal Hair Care Div.*, 821 F.2d 1085, 1088 (5th Cir. 1987) (holding "employees" under ADEA's parallel retaliation provision includes former employees as long as the alleged discrimination is related to or arises out of the employment relationship); O'Brien v. *Sky Chefs, Inc.*, 670 F.2d 864, 869 (9th Cir. 1982), *overruled on other grounds by Atonio v. Wards Cove Packing Co.*, 810 F.2d 1477, 1481-82 (9th Cir. 1987) *(en banc); Pantchenko v. C.B. Dolge Co.*, 581 F.2d 1052, 1055 (2d Cir. *1978); Rutherford v. American Bank of Commerce, 565 F.2d* 1162, 1165 (10th Cir. 1977); *Dunlop v. Carriage Carpet Co.*, 548 F.2d 139. 142 (6th Cir. 1977) (holding "employee" under Fair Labor Standard Act's anti-retaliation provision includes former employees) Cf. *EEOC v. J.M. Huber Corp.*, *927* F.2d 1322, 1331 (5th Cir. 1991).

"employee" broadly to "'include[] a former employee as long as the alleged discrimination is related to or arises out of the employment relationship.'" *Passer, 935* F.2d at *330* (quoting *Cosmair, Inc., L'oreal Hair Care Div.*, 821 F.2d at 1088); *see Pantchenko*, 581 F.2d at 1055. Essentially, the rationale supporting this interpretation is that a literal application of the term "employees" produces a result that would defeat the underlying policies of Title VII to eradicate discrimination in the work place. *See, e.g., Charlton, 25* F.3d at 200; *Passer*, 935 F.2d at 331; *Bailey*, 850 F.2d at 1509; *Rutherford, 565* F.2d at *1165-66*. For example, *in Charlton*, the court opined that "post-employment blacklisting is sometimes more damaging than on-the-job discrimination because an employee subject to discrimination on the job will often continue to receive a paycheck while a former employee subject to retaliation may be prevented from obtaining any work in the trade or occupation previously pursued." *Charlton, 25* F.3d at *200*.

The rationale of these decisions totally disregards, without explanation, the established analytical framework for statutory construction. Instead, they rely on broad considerations of policy. Most divine what they posit as Congress' intent from the reach of Title VII. *See, e.g., Charlton, 25* F.3d at 200. None of these decisions directly address the

absence of Congressional expression on this issue. These decisions are, therefore, at odds with the well-settled rule that in the absence of expressed Congressional intent, courts must assume that Congress intended to convey the language's ordinary meaning. *See Goldberger & Dubin, P. C.*, 935 F.2d at 506; *Stokley, 881* F.2d at 116. Indeed, these decisions fail to heed the Supreme Court's repeated mandate: "We have stated time and again that courts must presume that a legislature says in a statute what it means and means in a statute what it says there. When the words of a statute are unambiguous, then, this first canon is also the last: 'judicial inquiry is complete.'" *Connecticut Nat. Bank v. Germain,* 503 U.S. 249, 254 (1992) (quoting *Rubin v. United States, 449 U.S.* 424, 430 (1981)) (internal citations omitted). Furthermore, these decisions of our sister circuits disregard Title VII's definition of "employee" as the definitive source for determining the meaning of the term "employees" as used in Title VII's anti-retaliation provision. In short, we are completely unpersuaded by their analyses, which depend for their substance on broad policy arguments which are simply not supported by the plain language of Title VII.

III.

Although extending Title VII to cover former employees is tantalizing fruit, our judicial inquiry must cease when the language of a statute is plain and unambiguous. Such is the rule of law. In no uncertain terms, Congress, for whatever reason, has chosen, through the anti-retaliation provision of Title VII, to protect "employees," *i.e.*, "individual[s] employed by an employer," and "applicants for employment," but not to protect former employees. Because Robinson's complaint alleges post-employment retaliation, the district court properly dismissed his complaint under Federal Rule of Civil Procedure 12(b)(6). Accordingly, we affirm.

AFFIRMED

HALL, Circuit Judge, dissenting:

Imagine that on Friday, the first day of the month, XYZ Corporation decides to terminate two of its line workers, Smith and Jones, and immediately gives them two weeks' written notice. Smith and Jones, each believing that she has been unlawfully discriminated against, file charges with the EEOC on Monday the fourth. Unable, however, to afford the luxury of undue optimism, both Smith and Jones explore the possibility of signing on with XYZ's competitor, LMNOP, Inc.

On Tuesday the twelfth, XYZ's personnel department receives a letter from its LMNOP counterpart, requesting employment information and references on Smith and Jones. Annoyed that the pair have filed EEOC charges against the company, XYZ's personnel director intentionally and vindictively prepares false reports for dissemination to LMNOP. The spurious reports are placed in separate envelopes and stamped for mailing on Friday the fifteenth, which also happens to be Smith and Jones's last day at XYZ. Although Smith's report is included in Friday's outgoing mail, Jones's report is inadvertently excluded, and, therefore, not sent to LMNOP until Monday the eighteenth.

The majority cannot dispute that XYZ's conduct toward Smith and Jones was equally culpable, and that the company's behavior was precisely that which Title VII's anti-retaliation provision was designed to prohibit. Nevertheless, under the approach adopted today by the majority--an approach in diametric opposition to that employed by the vast preponderance of our sister circuits and by the EEOC itself--Smith would be entitled to file a retaliation charge, and Jones would be left out in the cold. Because the majority's decision will soon create many more Joneses than Smiths, I must respectfully dissent.

I.

A.

The majority acknowledges that, even if the term "employees" as used in Section 704(a) unambiguously designates only those persons earning a paycheck from the offending employer at the moment of retaliation, this court may nevertheless expand the scope of the designation to avoid a grossly absurd or plainly unintended result.[1] As illustrated by the XYZ hypothetical, the majority's construction of Section 704(a)

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[1] *See ante at 4-5 (citing Crooks v Harrelson, 282 U.S. 55, 59-60 (1930), and United States v. Ron Pair Enters., Inc., 489 U.S. 235, 24042 (1989)). See also NLRB v. Wheeling Electric Co., 444 F.2d 7x3, 787 (4th Cir. 1971):*

> The cardinal rule of statutory construction is that the intent of the legislative assembly is to be given effect . . and where a literal interpretation of a statutory provision would not accord with the intended purpose of the legislation, or produces an absurd result, courts must look beyond the plain words of the statute.

(citations omitted); *Crosse & Blackwell Co. v. FTC*, 262 F.2d 600. 606 (4th Cir. 1959) (eschewing a literal reading of the Federal Trade Commission Act where such an interpretation was "plainly at variance with the policy of the legislation as a whole" (*quoting Ozawa v. United States*, 260 U.S. 178 (1922)), and would produce an absurd result).

will inevitably lead to grossly absurd results; that those results are also plainly unintended can be readily understood by examining Congress's purpose in enacting Title VII.

B.

"In determining the meaning of [a] statute, we look not only to the particular statutory language, but to the design of the statute as a whole and to its object and policy." *Crandon v. United States*, 494 U.S. 152, 158 (1990) (citations omitted). The statutory scheme in this case is Title VII, and Congress's purpose in enacting it is easily discerned.

Title VII is sweeping, remedial legislation; it applies to virtually all entities that affect the employment relationship, and it proscribes a vast range of ignoble behavior.[2] There is a detailed enforcement procedure--including

[2] Various provisions of Sections 703 and 704 apply to employers, employment agencies. labor organizations, and joint labor-management committees. Section 703 prohibits, with few exceptions, all forms of discrimination in all aspects of the employment relationship on the basis of an individual's race, color. religion, gender, or national origin. 42 U.S.C.A. § 2000e-2 (West 1994). Section 704, in addition to the anti-retaliation provision at issue in this case, prohibits the publication in most cases of job notices or advertisements indicating a preference based on a suspect classification.

resort to the federal courts, which are accorded broad power to grant legal and equitable relief.[3] Congress demonstrated, by giving Title VII a broad reach, that it is serious about eradicating discrimination and its invidious effects within the employment relationship. That is why the statute was enacted, and that is why the anti-retaliation provision was included; Congress understood that Title VII could only be enforced effectively if the persons most aggrieved by discriminatory practices could come forward without fear of retribution. Unfortunately, the majority's construction of the term "employees" in Section 704(a) will actively hinder the enforcement mechanism.

This hindrance will work on two levels. There is, of course, the obvious hindrance of allowing an employer to escape sanctions for behavior that is clearly unlawful.[4] More subtle, however,

[3] Section 706(g) empowers the court to order declaratory relief, injunctive relief such as reinstatement or hiring of employees with or without back pay. or "any other equitable relief as the court deems appropriate." 42 U.S. C.A. §2000e-5(g) (West 1994). In addition, Section 102 of the Civil Rights Act of 1991 permits courts. in an appropriate case, to award compensatory and punitive damages for violations of Sections 703 and 704 of Title VII. 42 U.S.C.A. §1981a (West 1994).

[4] The dawn of the brave new world envisioned by the majority will not escape the attention of employers, who will soon enough realize that they have been given a free rein to

is the hindrance on enforcement that will almost certainly result from the remaining employees' reluctance to bring subsequent violations to the EEOC's attention; no reasonable employee will come forward if there is any chance that his or her term of employment will soon end, thus giving the employer carte blanche to retaliate. Moreover, an aggrieved person should not be forced to remain with an abusive employer solely to ensure that he or she receives the full protection of Title VII.

C.

Today's decision erodes a crucial Title VII enforcement mechanism; it thus will inevitably erode the substantive protections of Title VII itself. Because Congress's inclusion of Section 704(a) was intended to strengthen--not weaken--the statute, I would interpret the section's language in a manner consistent with that intent.

My interpretation of Section 704(a) hardly brands me a maverick; indeed, the majority's approach is the eccentric one. No fewer than six courts of appeal have concluded, as I do, that the section's protection extends to those employees no longer actively engaged in working for

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retaliate against disfavored employees, so long as the employee is first terminated. At XYZ Corporation, there may never be another Smith.

the retaliating employer.[5] Until now, the Seventh Circuit had stood alone in reaching the opposite conclusion. *See Reed v. Shepard*, 939 F.2d 484, 492-93 (7th Cir. 1991).[6] Moreover, the EEOC itself has appeared before this court, as *amicus curiae*, to urge that we adopt the dominant rule fashioned by our sister circuits.

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[5] *Charlton v. Paramus Bd. of Educ.*, 25 F.3d 194, 198-200 (3d Cir.), *cert. denied*, 115 S. CL 590 (1994); *EEOC v. J.M. Huber Corp.*, 927 F.2d 1322, 1331 (5th Cir. 1991) *(citing EEOC v. Cosmair, Inc., L'oreal Hair Care Div.*, 821 F.2d 1085, 1088 (5th Cir. 1987)); *Bailey v. USX Corp.*, 850 F.2d 1506, 1509-10 (11th Cir. 1988); *O'Brien v. Sky Chefs, Inc.*, 670 F.2d 864, 869 (9th Cir. 1982), *overruled on other grounds by Atonio v. Wards Cove Packing Co., Inc.*, 810 F.2d 1477, 1481-82 (9th Cir. 1987) (en banc); *Pantchenko v. C.B. Dolge Co., Inc.*, 581 F.2d 1052, 1055 (2d Cir. 1978); *Rutherford v. American Bank of Commerce*, 565 F.2d 1162, 1165 (10th Cir. 1977). *See also EEOC v. Ohio Edison Co.*, 7 F.3d 541 (6th Cir. 1993) (former employee may state a claim under Section 704(a) on something akin to an agency theory where offer of reinstatement is withdrawn in retaliation for the actions of another employee--the plaintiff's husband--in protesting his wife's discharge). Still another circuit has construed the nearly identical anti-retaliation provision of the Age Discrimination in Employment Act to apply to former employees. *See Passer v. American Chem. Soc'y.*, 935 F.2d 322, 330-31 (D.C. Cir. 1991).

[6] In *Reed*. the court of appeals affirmed a directed verdict for the defendants on the plaintiff's retaliation claim, because the complained-of activities took place after the plaintiff had been terminated.

Two of those courts have explicitly concluded that the primary focus in determining whether a plaintiff states a claim under Section 704(a) should be on whether the alleged retaliation either arose from the employment relationship or was related to the employment.[7] I wholeheartedly agree. By choosing instead to focus exclusively on the time when the employee was actively working, the majority has framed its inquiry much too narrowly; such a myopic approach only frustrates Congress's attempt, through Title VII, to eradicate workplace discrimination.[8]

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[7] *See Charlton*, 25 F.3d at 200 ("an employee may file a retaliation action against a previous employer for retaliatory conduct occurring after the end of the employment relationship when the retaliatory act is in reprisal for a protected act . . . and *arises out of or is related to the employment relationship.*"); *Pantchenko*. 581 F.2d at 1055 ("the statute prohibits discrimination *related to or arising out of an employment relationship*, whether or not the person discriminated against is an employee at the time of the discriminatory conduct.") (emphases added).

[8] In the instant case, Shell's alleged retaliation against Robinson--said to involve the dissemination of false information and an undeserved poor reference--arose from the parties' employment relationship because Shell would not have been provided the opportunity to retaliate against Robinson but for that relationship. Shell's alleged retaliation was also related to the employment because it assumed the form of facts and opinions about Robinson's professional affiliation with Shell.

II.

To this point, I have accepted, for the purposes of argument, the majority's contention that the term "employees," as used in Section 704(a), is unambiguous. I have argued that the result arrived at by the majority is nevertheless grossly absurd and so clearly contrary to Congressional intent as to justify expanding the asserted ordinary meaning of the term to embrace, if necessary, an extraordinary meaning.

In actuality, my burden is not as difficult as the majority purports it to be. If it were, it is unlikely that six other courts of appeal, comprised of judges who are doubtlessly familiar with the canons of statutory construction, would have all arrived at a conclusion that the majority of this court apparently finds so bewildering.

I believe it likely that our sister circuits have, at least implicitly, grounded their decisions on a premise that I find inescapable--that the term "employees" is ambiguous. Indeed, under the statute's tautological definition of the term as "individual[s] employed by an employer," *see* 42 U.S.C.A. §2000e(f) (West 1994), one could no more comprehend what an employee is than one could ascertain the legal essence of the term designee, if defined merely as an "individual designated by a designator."

To comprehend the meaning of employee (or designee), one must first understand what it means to employ (or to designate). The root "employ," of course, may mean many different things, even within the business/labor context; though it is often used to describe the current contractual relationship between a company and a designated worker, that is not its exclusive meaning.[9] Where the use of a term in a particular context admits of more than one meaning, that term is, *ipso facto*, ambiguous.

III.

Because the term "employees," as used in Section 704(a) is ambiguous, it is our duty to construe its meaning. I choose to interpret the term consistently with what I perceive to be the clear intent of Congress to effectively remedy the problem of discrimination in employment--a problem that today's decision will not assist in solving.

Chief Judge Ervin and Judge Michael join in this dissent.

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[9] For example, a manufacturing concern may have been, or will be, a major "employer." without regard to any particular worker. Similarly, a recent retiree of Company X receiving a gold watch for his or her faithful service may be introduced at the year-end awards banquet as a long-time "employee" of the company.

MURNAGHAN, Circuit Judge, dissenting:

I dissent.

While the majority has some basis for adopting the reasoning that the term "employee" as used in the statute does not in any case extend to a one-time, former or ex-employee, it is insufficient. In his dissent, Judge Hall convincingly points out the more compelling reasons for reaching the opposite conclusion, regardless of whether the term "employee" in one sense, and in certain circumstances not present here, has a plain meaning or is truly ambiguous. After all, despite the long lapse of time, Joe DiMaggio can still be referred to as a center fielder for the New York Yankees.

Chief Judge Ervin joins in this dissent.

PUBLISHED
UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

CHARLES T. ROBINSON, SR.,
Plaintiff-Appellant,

v.

SHELL OIL COMPANY,
Defendant-Appellee.

EQUAL EMPLOYMENT OPPORTUNITY COMMISSION,
Amicus Curiae.

NO. 93-1562

Appeal from the United States
District Court for the District of
Maryland, at Baltimore.

J. Frederick Motz, Chief District Judge.
(CA-93-28-JFM)

Argued: September 28, 1994

Decided: January 18, 1995

Entered: January 18, 1995

Before HALL, HAMILTON, and MICHAEL,
Circuit Judges.

Reversed and remanded by published opinion. Judge Hall wrote the majority opinion, in which Judge Michael joined.

Judge Hamilton wrote a dissenting opinion.

COUNSEL

ARGUED: Allen M. Lenchek, Washington, D.C., for Appellant. John Foster Shure, EQUAL EMPLOYMENT OPPORTUNITY COMMISSION, Washington, D.C., for Amicus Curiae. Lawrence Chris Butler, Houston, Texas, for Appellee. ON BRIEF: James R. Neely, Jr., Deputy General Counsel, Gwendolyn Young Reams, Associate General Counsel, Vincent J. Blackwood, Assistant General Counsel, EQUAL EMPLOYMENT OPPORTUNITY COMMISSION, Washington, D.C., for Amicus Curiae.

OPINION

HALL, Circuit Judge:

Charles T. Robinson, Sr., was fired in 1991 by Shell Oil Co., his employer of more than eleven years. Shortly thereafter, Robinson filed a charge with the Equal Employment Opportunity Commission (EEOC), alleging that Shell had terminated him on account of his race.

While that charge was pending, Robinson applied for a job with another company. The company contacted Shell, seeking a reference. According to Robinson, Shell retaliated against him for having complained to the EEOC by providing the company with false information and a poor reference.

Robinson then filed a second charge with the EEOC, in which he maintained that Shell's alleged retaliation had violated Section 704(a) of Title VII of the Civil Rights Act of 1964, which provides that

> [i]t shall be an unlawful employment practice for an employer to discriminate against any of his *employees* or applicants for employment . . . because he has opposed any practice made an unlawful employment practice by this subchapter, or because he has made a charge, testified, assisted, or participated in any manner in an investigation, proceeding, or hearing under this subchapter.

42 U.S.C. §2000e-3(a) (1988) (emphasis supplied). The above language, known colloquially as Title VlI's "anti-retaliation" provision, protects "employees" - defined tautologically as "individual[s] employed by an employer." 42 U.S.C. §2000e(f). The EEOC issued Robinson a right-to-sue letter on this second charge, and Robinson timely filed this action on January 4, 1993. Shell moved, under Fed. R. Civ. P. 12(b)(6), to dismiss Robinson's claim on the ground that, as the alleged retaliation occurred after Robinson had been fired by Shell,

Robinson was not Shell's "employee," and therefore not entitled to relief under §704(a). On April 8, 1993, the district court, citing this court's opinion in *Polsby v.* Chase, 970 F.2d 1360 (4th Cir. 1992), granted Shell's motion and dismissed the case.[1]

Scant days later, on April 26, 1993, the Supreme Court, at the urging of both parties, vacated our decision in *Polsby*.[2]

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[1] *Polsby* involved Title VII and RICO claims brought by a female physician against her former employer, the U.S. Department of Health and Human Services (HHS). In addition to her underlying claims of gender discrimination, Dr. Polsby alleged that HHS employees had retaliated against her after her employment had ended by reneging on a promise to credit her with a year's residency in recognition of the training that she had received.

The district court granted summary judgment to the defendants, finding that all of Dr. Polsby's claims--including the retaliation claim--were time-barred. A panel of this court agreed that the claims were stale, and affirmed the lower court's decision on that basis. However, we held alternatively that Title VII does not provide a remedy to former employees for acts of retaliation committed by an employer after the employment has ended. *Id.* at 1365.

[2] *Polsby v. Shalala*. 113 S. Ct. 1940 (1993). A new administration had replaced the old during the pendency of the appeal. The Solicitor General's brief adopted Dr. Polsby's position, arguing that the panel had based its alternative holding on a point not briefed and argued, and that summary judgment was otherwise precluded by the existence of a genuine issue of material fact as to the time-bar question. The Court remanded for further consideration "in light of the pos.tion asserted

Robinson filed his notice of appeal in the instant case on May 6, 1993. We now ask anew whether the protection against retaliation afforded by Title VII to "employees" extends to former employees. We conclude that it does; hence, we reverse the judgment of the district court and remand this case for further proceedings.

I.

"In determining the meaning of [a] statute, we look not only to the particular statutory language, but to the design of the statute as a whole and to its object and policy." *Crandon v. United States*, 494 U.S. 152, 158 (1990) (citations omitted).[3] The "statute" in this case is Title VII, and one need not closely scrutinize its language in order to clearly discern Congress's purpose in enacting it. Title VII is sweeping, remedial legislation; it applies to virtually all entities that may directly affect the employment relationship, and it proscribes a vast range of ignoble behavior.[4] There is a detailed enforcement procedure--including, if necessary, resort to the federal courts, which are accorded broad power to grant legal and equitable relief.[5]

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by the Acting Solicitor General...." *Id.* We in turn remanded to the district court to resolve any outstanding material facts and render a new judgment; that judgment is apparently still pending.

As the appeal in the instant case has progressed, the government's position has remained consistent. We permitted the EEOC to participate in this case *as amicus curiae*, and it has filed a brief and presented oral argument in support of Robinson.

[3] *See also NLRB v. Wheeling Electric Co.*, 444 F.2d 783, 787 (4th Cir. 1971):

> The cardinal rule of statutory construction is that the intent of the legislative assembly is to be given effect . . . and where a literal interpretation of a statutory provision would not accord with the intended purpose of the legislation, or produces an absurd result courts must look beyond the plain words of the statute.

(citations omitted); *Crosse & Blackwell Co. v. FTC*, 262 F.2d 600, 606 (4th Cir. 1959) (eschewing a literal reading of the Federal Trade Commission Act where such an interpretation was "plainly at variance with the policy of the legislation as a whole" quoting *Cravens v. United States*, 260 U.S. 178 (1922)], and would produce an absurd result).

[4] Various provisions of Sections 703 and 704 apply to employers, employment agencies, Labor organizations, and joint labor-management committees. Section 703 prohibits, with few exceptions, all forms of discrimination in all aspects of the employment relationship on the basis of an individual's race, color, religion, gender, or national origin. 42 U.S.C. § 2000e-2. Section 704, in addition to the anti-retaliation provision at issue in this case, prohibits the publication in most cases of job notices or advertisements indicating a preference based on a protected classification.

[5] Section 706(g) empowers the court to order declaratory relief, injunctive relief such as

It is evident that Congress has demonstrated, by virtue of Title VII's reach, that it is serious about eradicating the invidious effects of discrimination within the employment relationship. That is why the statute was created, and that is why the anti-retaliation provision was included; Congress understood that Title VII could only be enforced effectively if the persons most aggrieved by discriminatory practices could come forward without fear of retribution. Were we to literally construe the word "employee" in Section 704(a) to exclude former employees, such a construction would actively hinder the enforcement mechanism.

There is, of course, the obvious hindrance of allowing an employer to escape sanctions for behavior that, but for the fortuity of the employment status of the behavior's intended target, is clearly unlawful. More subtle, however,

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reinstatement or hiring of employees with or without back pay, or "any other equitable relief as the court deems appropriate." 42 U.S.C. §2000e-5(g). In addition, Section 102 of the Civil Rights Act of 1991 now permits courts, in an appropriate case, to award compensatory and punitive damages for violations of Sections 703 and 704 of Title VII. 42 U.S.C.A. § 1981a (1994). This most recent expansion of the courts' remedial powers addresses a major concern in *Polsby*--that appropriate relief would be difficult or impossible to fashion for former employees who, typically, obtain another job despite the best (or worst) efforts of a previous employer.

is the hindrance on enforcement that will almost certainly result from the remaining employees' reluctance to bring other violations to the EEOC's attention if there is a chance that his or her term of employment will soon end (thus giving the employer carte blanche to retaliate). Conversely, an aggrieved person should not be forced to remain with an abusive employer solely to avail himself of the full protection of Title VII.

Eroding Title VII's effective enforcement concomitantly erodes the vitality of its substantive provisions. Because we believe it apparent that Congress intended to strengthen--not weaken--Title VII by including Section 704(a), we interpret that section's language to be consistent with the intent that we perceive.[6]

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[6] Though not essential to our analysis, we note that not only would a literal construction of "employee" in such cases be plainly at variance with the policy of Title VII as a whole, but that such a construction is quite capable of producing absurd results. Imagine a scenario where two disaffected workers at Company X have filed discrimination charges with the EEOC against the company and have each applied to Company Y for another job. Suppose that on a Friday afternoon, Company X's personnel department receives a letter from Company Y asking for references on both workers. Suppose further that Worker A's letter of resignation becomes effective on the same Friday, while Worker B stays for another week. If Company X waits until Monday to respond to Company Y's request and then provides false information on both workers in retaliation for

II.

Our decision today comports with those of the vast majority of circuits that have addressed this issue,[7] and is

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each having filed discrimination charges, then, under a literal interpretation of the word "employee" in Section 704(a), only Worker B would have a claim for retaliation.

Because there can be no principled distinction between the two workers' situations, we do not believe that Congress could have intended the two cases to be resolved differently. Certainly there is nothing in Section 704(a)'s legislative history that would suggest that Congress expressly considered--and then rejected--the possibility that it would apply to a situation like Robinson's; in fact, the legislative history is silent as to the specific matter before us.

We must note, however, that we do not decide this case based primarily on the absence of adverse legislative history, but that we discern Congress's intent by relying in large part on the provisions of the statutory scheme as a whole, of which Section 704(a) was and is an integral part. We do not think that the word "employee" as used in that section is so clearly unambiguous as to preclude resort to this method of statutory interpretation. We imagine that the term is frequently used to actually describe a former employee. e.g., Company X, at its year-end banquet, awarding a gold watch to a recent retiree, "a 25-year *employee* of Company X."

[7] *Charlton v. Paramus Bd. of Educ.*, *25* F.3d. 194, 198-200 (3d Cir. *1994*); *cert. denied*, 63 U.S.L.W. 3421 (U.S. Nov. 28, *1994*); *EEOC v. J.M. Huber Corp.*, 927 F.2d 1322, 1331 (5th Cir. 1991); *Bailey v. USX Corp.*, 850 F.2d 1506, 1509-10 (11th Cir. *1988*); *O'Brien v. Sky Chefs*, Inc., 670 F.2d 864, 869 (9th Cir. 1982), *overruled on other*

in implicit agreement with another circuit that has construed the nearly identical anti-retaliation provision of the Age Discrimination in Employment Act to apply to former employees.[8] The Seventh Circuit stands alone in reaching the opposite conclusion. *Reed v. Shepard*, 939 F.2d 484, 492-93 (7th Cir. 1991) (affirming a directed verdict for the defendants on the plaintiff's retaliation claim because the complained-of activities took place after the plaintiff had been terminated).

The primary focus in determining whether a plaintiff states a claim under Section 704(a) should be on whether the alleged retaliation either arose from the employment relationship or was related to the employment.[9] Consequently, we believe

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grounds by Atonio v. Wards Cove Packing Co., Inc., 810 F.2d 1477, 1481-82 (9th Cir. 1987) (en banc); *Pantchenko v. C.B. Dolge Co., Inc.*, 581 F.2d 1052, 1055 (2d Cir. 1978); *Rutherford v. American Bank of Commerce*, *565* F.2d 1262, 1165 (10th Cir. 1977). *See also EEOC v. Ohio Edison Co.*, 7 F.3d 541 (6th Cir. 1993) (former employee may state a claim under Section 704(a) on something akin to an agency theory where offer of reinstatement is withdrawn in retaliation for the actions of another employee--the plaintiff's husband--in protesting his wife's discharge).

[8] *Passer v. American Chem. Soc'y*, 935 F.2d 322, 330-31 (D.C. Cir. 1991).

[9] *See Charlton*, 25 F.3d at 200 ("an employee may file a retaliation action against a previous employer for retaliatory conduct occurring after the end of the employment relationship when the retaliatory act is in reprisal for a protected

that the *Reed* court focused its inquiry too narrowly, considering only the contractual aspect of the larger relationship.

In the instant case, we may conclusively state that Shell's alleged retaliation against Robinson--said to involve the dissemination of false information and an undeservedly poor reference--arose from their employment relationship because Shell would not have been provided the opportunity to retaliate against Robinson but for the fact that it had employed him. Though our inquiry need not proceed further, Shell's alleged retaliation was also related to the employment because the retaliation itself assumed the form of facts and opinions grounded in Robinson's professional affiliation with Shell.

We do not share the concerns expressed at oral argument that future generations of management, themselves guilty of no Title VII violation, will be forced to defend -- and possibly be held liable for -- retaliation claims against their company brought by former employees who only discover the wrongdoing years after it has occurred. The "discovery

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act . . . and *arises out of or is related to the employment relationship."); Pantchenko,* 581 F.2d at 1055 ("the statute prohibits discrimination *related to or arising out of an employment relationship,* whether or not the person discriminated against is an employee at the time of the discriminatory conduct.") (emphases added).

rule," often used to toll statutes of limitations that would otherwise insulate a defendant from liability, is an equitable doctrine; deciding whether to employ it in a particular case requires careful consideration of the prejudice to the defendant as well as the potential injustice to the plaintiff. Our confidence in our brethren to properly consider the merits in such cases is not so low that we feel compelled to foreclose all possibility of review. In any event, Robinson's claim in *this* case is not stale, therefore we decline to march in step with this particular parade of horribles.

The judgment of the district court is reversed, and the case is remanded for further proceedings.

REVERSED AND REMANDED

HAMILTON, Circuit Judge, dissenting:

Employer retaliation is deplorable and regrettable and has no place in our society. But, that is not to say that every act of employer retaliation is remediable under Title VII. When interpreting a statute such as the one before this court, my role as an Article III jurist is not to decide what the law should be, but rather to apply the rules of statutory construction in order to give meaning to the statute Congress created. In holding that §704(a) of Title

VII provides a remedy to former employees for acts of retaliation committed by an employer *after* the employment relationship has terminated? The majority disregards the rules of statutory construction which this court is bound to follow. Specifically, the majority; (1) disregards the plain meaning of the term "employee" and (2) gives the term "employee" a meaning excluded by its definition in 42 U.S.C.A. § 2000e(f) (West Supp. 1994). Furthermore, the majority's holding creates a new cause of action that will unfairly burden employers by requiring them to defend claims of retaliation by former employees several decades in the future when material evidence in their defense has likely vanished. I, therefore, respectfully dissent.

I.

Initially, it is helpful to lay out the all too familiar framework of statutory interpretation. Courts are charged with the duty to apply the law that Congress enacted. Accordingly, "[w]e begin, as we must, by examining the statutory language, bearing in mind that we should give effect to the legislative will as expressed in the language." *United States v. Murphy*, 35 F.3d 143, 145 (4th Cir. 1994) (citing *K-Mart Corp. v. Cartier, Inc.*, 486 U.S. 281, 291 (1988)). In examining statutory language,

generally, words are given their common usage, and "[c]ourts are not free to read into the language what is not there, but rather should apply the statute as written." *Id.* We must acknowledge that the duty of this court is to adhere faithfully to the rules of statutory interpretation rather than to "exercise[] a high degree of ingenuity in the effort to find justification for wrenching from the words of a statute a meaning which literally they did not bear in order to escape consequences thought to be absurd or to entail great hardship." *Crooks v. Harrelson, 282 U.S. 55, 60* (1930). If a statute defines a term in its definitional section, then that definition controls the meaning of that term wherever that term appears throughout the statute. *See Florida Dep't of Banking & Finance v. Board of Governors of Fed Reserve Sys.*, 800 F.2d 1534, 1536 (11th Cir. 1986) (definition of term in definitional section of statute controls construction wherever that term appears throughout the statute), *cert. denied*, 481 U.S. 1013 (1987). As a general rule "[a] definition which declares what a term means . . . excludes *any* meaning that is not stated." 2A George Sutherland, *Statutes and Statutory Construction* §47.07, at 152 (5th ed. 1992) (emphasis added).

Our inquiry must cease if the statutory language is unambiguous and "'the statutory scheme is coherent and

consistent'" *Murphy*, *35* F.3d at 145 (quoting *United States v. Ron Pair Enters., Inc., 489 U.S.* 235, 240 41 (1989)). In other words, if the statutory language "'is plain and admits of no more than one meaning, the duty of interpretation does not arise, and the rules which are to aid doubtful meanings need no discussion.'" *Id.* (quoting *Caminetti v. United States, 242* U.S. 470, 485(1917)). "The language being facially clear and 'within the constitutional authority of the law-making body which passed it, the sole function of the courts is to enforce it according to its terms.'" *Id.* (quoting *Caminetti, 242 U.S.* at 485). Thus, if the language of the statute is not ambiguous, then we do not engage in interpretation of the language; rather, we merely apply the language. *See id.*

There are, however, rare and narrow exceptions to these precepts *as Murphy* noted: "[w]hile cautioning lower federal courts not to stray beyond the plain language of unambiguous statutes, the Supreme Court has also explained that departure from the statutory language may be permitted in limited circumstances." *Id.* One such circumstance arises if the literal application of statutory language would lead to an absurd result. *See Crooks, 282 U.S.* at 59-60. Only, however, "under rare and exceptional circumstances" do courts find that literal application of statutory language

would lead to an absurd result. *Id.* at 60. In such cases, the absurdity "must be so gross as to shock the general moral or common sense. And, there must be something to make plain [Congress' intent] that the letter of the statute is not to prevail." *Id.*

Another circumstance permitting courts to look beyond the plain meaning of unambiguous statutory language arises if literal application of statutory language would produce a result demonstrably at odds with the intent of Congress; in such cases, the intent of Congress rather than the strict language controls. *See Ron Pair Enters., Inc.*, 489 U.S. at 242 (The plain meaning of legislation should be conclusive, except in the "rare cases [in which] the literal application of a statute will produce a result demonstrably at odds with the intention of the drafters. In such cases, the intention of the drafters, rather than the strict language controls.") (internal quotation marks omitted). To come within the ambit of this exception to literal application of the statutory language, however, the intent must have been clearly expressed by the legislative body. *See Russello v. United States, 464* U.S. 16, 20 (1983). Most importantly, in the absence of expressed Congressional intent, we must assume that Congress intended to convey the language's ordinary meaning. *See United States v. Goldberger & Dubin, 935* F.2d 501, 506 (2d

Cir. 1991) ("The words of a statute should be given their normal meaning and effect in absence of showing that some other meaning was intended."); *United States v. Stokely*, 881 F.2d 114, 116 (4th Cir. 1989) ("In the absence of a contrary indication, the court must assume the drafters of a statute intended to convey the ordinary meaning attached to the language.").

Otherwise, if the plain language of the statute is ambiguous a court may look beyond the plain language to the legislative history for guidance. *See United States v. Southern Management, 955* F.2d 914, 920 (4th Cir. 1992) (If the statute's words did not convey a clear meaning, court should look to "other source[s] of legislative intent."). Thus, with the groundwork laid, I turn to the statute at issue.

Section 704(a) provides in pertinent part:

> (a) It shall be an unlawful employment practice for an *employer* to discriminate against any of his *employees or applicants for employment* . . . because he has made a charge, testified, assisted, or participated in any manner in an investigation, proceeding, or hearing under this subchapter.

42 U.S.C.A. § 2000e-3(a) (West 1981) (emphasis added). Subsection 2000e(f) defines "employee" for purposes of all provisions of Title VII as "an individual employed by an employer." 42 U.S.C.A. § 2000e(f) (West Supp. 1994). Read in *pari materia*, these sections of Title VII provide a remedy to *employees* and *applicants for employment* who have either availed themselves of Title VII protections or assisted others in doing so for acts of retaliation committed by their employers during the employment relationship.

Despite the fact that §2000e(f) defines the term "employee" as "an individual employed by an employer," the majority legally concludes, rather remarkably, that the term "employees" as used in §704(a) means "former employees." Application of the canons of statutory construction leads to the inescapable conclusion that the meaning of the term "employees" is plain and that construing the term to include "former employees" is legally untenable. Because "former employees" are not included in the statutory language, §704(a) of Title VII does not protect them. Given that the statute does not protect former employees, Robinson has no claim under its aegis.

Because Title VII defines "employee" for purposes of all provisions of Title VII, that definition controls the meaning of "employee" wherever it appears

throughout the statute. *See Florida Dep't of Banking & Finance, 800* F.2d at 1536. Title VII defines employee as "an individual employed by an employer," 42 U.S.C.A. §2000e(f) (West Supp. 1994). Because Title VII *does not* define "employee" as an individual *no longer employed by* an employer? then that meaning is excluded as a meaning from the term "employee." *See Statutes and Statutory Construction* §47.07, at 152. We are simply prohibited from reading into the clear language of the definition of "employee" that which Congress did not include. *See Murphy,* 35 F.3d at 145. For if Congress intended Title VII to remedy discrimination beyond the employment relationship, then it could have easily done so by including "former employee" when defining the term "employee."

Next, the language comprising Title VII's *definition* of the term "employee" is *not ambiguous* "an individual employed by an employer," 42 U.S.C.A. § 2000e(f) (West Supp. 1994). The rules of statutory construction require us to give the words Congress used to define "employee" their common usage. *See Murphy,* 35 F.3d at 145. The term "employed" as used in §2000e(f) is commonly used to mean "performing work under an employer-employee relationship." *Black's Law* Dictionary 525 (6th ed. 1990). Certainly, the term "employed" is not commonly used to mean "no longer performing work under an employer-employee relationship," as evidenced by

the majority's failure to cite even one dictionary definition or case in support of this truly remarkable proposition. Furthermore, "employer" as used in §2000e(f) is commonly used to mean "one who employs the services of others." *Id.* Again, no meaningful argument can be made that the term employer is commonly used to mean "one who no longer employs the services of others." Because the language in Title VII's definition of "employee" is not ambiguous, any attempt to resort to legislative history is foreclosed. *See Murphy, 35* F.3d at 145. this court is bound to apply literally the term "employees" in §704(a) as defined by Congress in 42 U.S.C.A. §2000e(f) without examination of any other sources of legislative intent. *Id.*

The court in *Polsby v. Chase, 970 F.2d* 1360, 1365-67 (4th Cir. *1992), vacated,* 113 S. Ct. 1940 (1993),[1] also

[1] The Supreme Court vacated this court's judgment in *Polsby* and remanded the case to this court for "further consideration in light of the position asserted by the Acting Solicitor General in his brief for the United States filed March 5, *1993.*" *Polsby v Shalala,* 113 S. Ct. 1940 (1993). Because the Supreme Court vacated *Polsby* on this ground, I maintain that no meaningful argument can be made that the Supreme Court in any way addressed the merits of the issue here and concluded *Polsby* to be legally incorrect. *See United States Dep't of Health & Human Servs.. v FLRA, 983* F.2d 578, 581-82 & n.2 (4th Cir. 1992) (adopting reasoning of vacated opinion where vacatur did not address the issue). Conversely, I do not contend that *Polsby* carries any precedential weight. *Id.*

relied on a plain reading of §704(a) to hold that Title VII does not provide a remedy to former employees for acts of retaliation committed by an employer after the employment relationship has terminated. In *Polsby*, the court correctly recognized that the plain language of §704(a) is likewise *void* of any language referring to *former* employees; rather, §704(a) specifically indicates that it is unlawful for an employer to retaliate against (1) employees or (2) applicants for employment. *Id.* at 1365. The *Polsby* court concluded that the absence of any language in §704(a) referring to former employees was strong evidence that Congress did not intend Title VII to protect former employees. *Id.* In a similar vein, Congress' decision in enacting §704(a) to add "applicants for employment" as persons *distinct* from "employees" to be protected from retaliation is strong evidence of Congress' intent that the term "employees" in §704(a) does not include former employees. *Id.* Therefore, applying ordinary meanings to the terms employees, employed and employer, it is clear that §704(a) of Title VII does not remedy acts of retaliation once the employment relationship has terminated.

Although the rules of statutory construction do not require me to proceed any further in my analysis, in order to emphasize the propriety of my position

and the impropriety of the majority's position, I shall present additional grounds upon which this court relied in *Polsby*, and the Seventh Circuit relied *in Reed v. Shepard, 939* F.2d 484, 492-93 (7th Cir. 1991), to hold that §704(a) of Title VII does not provide a remedy to former employees for acts of retaliation committed by an employer after the employment relationship has terminated.

The *Polsby* court correctly recognized that the types of practices that Title VII forbid strongly point toward §704(a)'s scope not extending beyond the employment relationship. *Polsby, 970* F.2d at 1365. The types of practices that Title VII forbid are particularly related to *employment, not* post-employment matters. *Id.* For example, Title VII specifically defines "unlawful employment practice" in part as the failure or refusal "to hire or to discharge any individual, or otherwise to discriminate against any individual with respect to his compensation, terms, conditions, or privileges of employment, because of such individuals race, color, religion, sex, or national origin." 42 U.S.C.A. §2000e-2(a)(1) (West 1981). This definition comprises discrimination with respect to certain aspects of employment, and does not redress discriminatory practices *after* the employment relationship has terminated. *Polsby*, 970 F.2d at 1365.

Similarly the Seventh Circuit concluded that §704(a) of Title VII does not redress post-employment retaliation because the second element of a *prima facie* case of retaliation under Title VII requires the employee to suffer an "adverse *employment* action" that necessarily entails conduct that occurs during the employment relationship. *Reed*, 939 F.2d at 492-93 (emphasis added). The *prima facie* case for retaliation under Title VII as set forth by our circuit also requires an employee to prove that his employer took "adverse *employment* action against" him. *Williams v. Cerberonics, Inc.*, 871 F.2d 452, 457 (4th Cir. 1989) (emphasis added). Adverse employment action necessarily requires that the adverse action taken by the employer must be in relation to its own act of *employing* the employee bringing the charge. Consequently, any adverse action taken after the employment relationship has terminated cannot be actionable under Title VII. Recognizing this point, the *Reed* court stated that because "the alleged retaliatory activities took place *after* the termination of Reed's employment" those activities were "not an adverse employment action." *Reed, 939* F.2d at 492-93.

Given the types of practices that Title VII forbid, it follows that Congress drew the line defining the scope of Title VII at its most logical place--

the termination of the employment relationship. As the *Polsby* court succinctly stated, "Title VII does not redress discriminatory practices, however unsavory, which occur after the employment relationship has ended." *Polsby, 970* F.2d at 1365. Rather, Congress specifically enacted § 704(a) of Title VII so that employees falling victim to discrimination during their employment would be able to invoke Title VII to protect their rights without fear of retaliation. My interpretation of § 704(a) fully comports with this purpose and thus is in accord with the express intent of Congress.

II.

Incredibly, the majority totally disregards the aforementioned canons of statutory construction. The majority, as well as those circuits with which it is in accord,[2] primarily rely on broad, and

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[2] *See Charlton v. Paramus Bd. of Educ.*, 25 F.3d 194, 198-200 (3d Cir. *1994), cert. denied, 63 U.S.L.W.* 3421 (U.S. Nov. 28, 1994); *EEOC v. J.M. Huber Corp.*, 927 F.2d 1322,1331 (5th Cir. 1991); *Bailey v. USX Corp.*, 850 F.2d 1506,1509 (11th Cir. 1988); *O'Brien v. Sky Chefs, Inc.*, 670 F.2d 864,869 (9th Cir. 1982), *overruled on other grounds by Atonio v. Wards Cove Packing Co.*, 810 F.2d 1477,1481-82 (9th Cir. 1987) *(en banc); Pantchenko v. C.B. Dolge Co., Inc.*, 581 P.2d 1052,1055 (2d Cir. *1978); Rutherford v. American Bank of Commerce*, 565 F.2d 1162,1165 (10th Cir. 1977).

as the *Polsby* court noted, "dubious" considerations of policy to disregard the plain language of §704(a) in order to protect former employees. Essentially, both maintain that a literal interpretation of the term "employees" produces a result that would defeat the underlying policies of Title VII to eradicate discrimination in employment. *See, e.g., Charlton,* 25 F.3d at 200; *Bailey,* 850 F.2d at 1509. Specifically, the majority concludes that a literal construction of the term "employees" in §704(a) "would actively hinder the enforcement mechanism" of Title VII. *Ante* at 5.

No meaningful argument can be made that any language in Title VII's definition of the term "employee" is ambiguous thus allowing this court to look beyond the plain meaning for guidance. As proved, "employees" in §704 cannot be read to include former employees, because if a statute defines a term, then all other meanings of that term not stated are excluded. *See Statutes and Statutory Construction* §47.07, at 152. The majority erroneously disregards Title VII's definition of "employee" as the definitive source to determine the meaning of the term "employees" as used in §704(a), summarily dismissing it as "tautological." *See id; Florida Dep't of Banking & Finance, 800* F.2d at 1536 (stating that the definition of term in definitional section of

statute controls construction wherever that term appears throughout the statute). Noteworthy is the fact that the majority does not offer any authority for such an obvious deviation from the well-settled rules of statutory analysis. In sum, interpreting "employees" to include former employees requires this court to give "employees" a definition beyond its plain meaning and disregards the definition provided by Congress. *See Ron Pair Enterprises, Inc., 489 U.S.* at 241-42.

Finally, and most importantly, a literal application of the term "employees" in §704(a) as defined by Congress in §2000e(f) would not produce an absurd result, or as the majority concludes, "actively hinder the enforcement mechanism," *ante* at 5, thus allowing us to disregard the statute's plain meaning. The reason is that Congress *did not clearly express* any intention that Title VII redresses employer conduct beyond the employment relationship. The majority's conclusion that a literal application of the statute's language would produce an absurd result or actively hinder the enforcement mechanism of Title VII necessarily assumes that Congress made known its intentions for a result different than that produced by a literal application of the statute's language. The majority divines what it posits as Congress' intent that §704(a) protects

former employees from the "reach" of Title VII:

> It is evident that Congress has demonstrated, by virtue of Title VII's reach, that it is serious about eradicating the invidious effects of discrimination within the employment relationship. That is why the statute was created, and that is why the anti-retaliation provision was included; Congress understood that Title VII could only be enforced effectively if the persons most aggrieved by discriminatory practices would come forward without fear of retribution. Were we to literally construe the word "employee" in §704(a) to exclude former employees, such a construction would actively hinder the enforcement mechanism.

Ante at 5.

As authority permitting it to conclude Congress intended §704(a) to protect former employees, based solely on the proposition that the broad "reach" of Title VII conveys Congress' intent to do so, the majority relies on authority that supports my position. This authority *is*

Crandon v. United States, 494 U.S. 152, 158 (1990). The majority quotes *Crandon* as follows: "In determining the meaning of [a] statute, we look not only to the particular statutory language, but to the design of the statute as a whole and to its object and policy." *Id.* The majority quotes *Crandon* out of context. *Crandon* involved the interpretation of 18 U.S.C.A. §209(a) (West Supp. 1994) to determine whether employment status is an element of the offenses of receipt by a government employee of supplemental salary from an outside source and payment of supplemental salary by an outside source to a government employee. *See Crandon, 494 U.S.* at 152. In holding that employment status is an element of both offenses, the Court reasoned:

> We note only that a literal reading of the statute--which places a pre-Government service severance payment outside of the coverage of §209(a) is consistent with one of the policies that motivated the enactment of the statute. Because the language Congress used in § 209(a) is thus in "harmony with what is thought to be the spirit and purpose of the act," this case presents none of the "rare and exceptional circumstances" that

may justify a departure from statutory language.

Id. at 168 (quoting *Crooks*, 282 U.S. at 59). In regard to the rare and exceptional circumstances justifying a departure from the statutory language, *Crooks* stated: "the absurdity must be so gross as to shock the general moral or common sense. *And there must be something to make plain [Congress' intent] that the letter of the statute is not to prevail." Crooks, 282 U.S.* at 60 (emphasis added). Therefore, contrary to the majority's characterization, *Crandon* followed the well settled rule of statutory construction requiring courts to apply literally the plain language of a statute, barring the rare and exceptional case where Congress clearly expresses its desire for a different result than that produced by the literal application of the plain language.

In this case, nowhere does Congress make plain that this court should not follow the letter of the law. As the majority acknowledges, the legislative history of Title VII is noticeably silent with regard to whether Title VII protects former employees. *Ante* at 6 n.6. Moreover, the majority has not pointed to any specific provisions of Title VII remedying post-employment-employer-conduct in support of its argument that the design of Title VII as a whole makes clear Congress' intent that §704(a) of

Title VII protects *former* employees. *Ante* at 5.

Given the lack of affirmative Congressional expression on whether Congress intended §704(a) to protect former employees, a meaningful argument cannot be made that a literal application of the term "employees" as used in §704(a) and defined in §2000e(f) creates the rare and exceptional circumstance of producing an absurd result or actively hindering the enforcement mechanism. Accordingly, the majority's position is completely untenable.

III.

Finally, the majority's interpretation will produce absurd results. For example, suppose Employee X, a minority, files a race discrimination charge against his employer, Company A. In retaliation, Employee X's supervisor falsely adds negative performance comments to Employee X's personnel file. Employee X leaves Company A and accepts a job with Company B; thirty years pass. Employee X leaves Company B and seeks a new job with Company C who requests recommendations of X from A and B. Employee X's supervisor at Company A died five years earlier; his replacement researches Employee X's personnel file and writes a negative recommendation according to the information in Employee X's file. Under the majority's holding,

Employee X can bring a suit under §704(a) alleging retaliation against Company A for conduct that occurred thirty years earlier by a person no longer employed, let alone deceased. Unquestionably, by enacting §704(a) of Title VII, Congress could not have intended an employer, thirty years later, to defend claims by former employees alleging retaliation as the result of alleged discriminatory acts that only surface when any evidence in its defense has likely vanished. Such a result would be absurd. Furthermore, my concerns are not allayed by the majority's statement that the statute of limitations or the doctrine of equitable tolling would often bar such a suit, because the cause of action for retaliation arises upon the employer's present negative recommendation to the former employee's proposed employer.

IV.

I realize my view that Title VII does not provide a remedy to former employees for acts of retaliation committed by an employer after the employment relationship has terminated has been embraced by only one court, *see Reed, 939 F.2d* at 494-93, while several other courts have reached a contrary conclusion, *see, e.g., Charlton, 25* F.3d at *198-200; J.M. Huber Corp.*, 927 F.2d at 1331. In my view, the conclusion reached by the majority today and those courts

with which it is in accord is an impulsive one, brought on by the quite laudable desire to eliminate all retaliation in the work place. However, my role as a jurist is not to see to the task of eradicating retaliation in the work place. Under our Constitution, that burden falls to the legislative branch. My only role here is to give meaning to the statute Congress enacted through the well-defined rules of statutory construction. A faithful adherence to those precepts leads to one inescapable and incontrovertible conclusion Title VII does not provide a remedy under the facts of this case. because I would affirm the district court's dismissal of Robinson's complaint pursuant to Fed. R. Civ. P. 12(b)(6), I respectfully dissent.

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF MARYLAND

CHARLES T. ROBINSON, SR.

v.

SHELL OIL COMPANY

Civil No. JFM-93-28

ENTERED April 8, 1993

MEMORANDUM

Charles T. Robinson, Sr., has filed this action under Title VII of the Civil Rights Act of 1964, alleging that Shell Oil Company, his former employer, "has been providing false information and negative job references to perspective [sic] employers." Defendant has filed a motion to dismiss to which plaintiff has responded.

Defendant's motion will be granted. The Fourth Circuit has expressly held that Title VII does not confer upon an ex-employee a cause of action against a former employer for acts of retaliation allegedly committed after the employment relationship has ended. See Polsby v. Chase, 970 F.2d 1360, 1365 (4th Cir. 1992). Although, as plaintiff points out, other Circuits have held to the contrary,

this court is, of course, bound by the law of the Fourth Circuit.

A separate order effecting the ruling made in this memorandum is being entered herewith.

Date: April 8, 1993

/s/ J. Frederick Motz
J. Frederick Motz
United States District Judge

UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

No. 93-1562

CA-93-28-JFM

CHARLES T. ROBINSON, SR.

Plaintiff - Appellant

EQUAL EMPLOYMENT OPPORTUNITY COMMISSION

Amicus Curiae

v.

SHELL OIL COMPANY

Defendant - Appellee

FILED March 1, 1995
ENTERED March 1, 1995

On Petition for Rehearing with
Suggestion for Rehearing In Banc

The appellee's petition for rehearing and suggestion for rehearing in banc were submitted to the Court. A majority of judges having voted in a requested poll of the Court to grant rehearing in banc,

IT IS ORDERED that the rehearing in banc is granted.

IT IS FURTHER ORDERED that this case shall be calendared for argument at the June 1995 session of Court. Within ten days of the date of this order, twenty (20) additional copies of appellant's brief, twenty (20) additional copies of appellee's brief and twenty (20) additional copies of the appellant's reply brief, if any, shall be filed

The appellee will file twenty (20) additional copies of the joint appendix.

For the Court,

/s/ Bert M Montague
CLERK

95-1376

(2)

Supreme Court, U.S.
FILED
MAR 25 1996
CLERK

No. _____

IN THE
Supreme Court of the United States
OCTOBER TERM, 1995

CHARLES T. ROBINSON,
Petitioner,

v.

SHELL OIL COMPANY,
Respondent.

Petition for Writ of Certiorari to the United States Court of Appeals for the Fourth Circuit

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

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30 pp

QUESTIONS PRESENTED FOR REVIEW

1. Does Title VII § 704(a) of the Civil Rights Act of 1964 give former employees a cause of action for acts of retaliation allegedly occurring after the employment relationship has ended?

PARTIES TO THE PROCEEDING

1. Charles T. Robinson, Sr. (hereinafter referred to as "Robinson"), Plaintiff in the District Court and Petitioner.

2. Shell Oil Company[1] (hereinafter referred to as "Shell"), Defendant in the District Court and Respondent.

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[1] Shell Oil Company is wholly owned by Shell Petroleum Inc. Shell Petroleum Inc. is directly or indirectly owned 60% by Royal Dutch Petroleum Company and 40% by the "Shell" Transport and Trading Company, p.l.c., which are publicly traded companies. Shell Oil Company has no subsidiaries which are less than wholly owned.

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No. _____

_____

IN THE

Supreme Court of the United States

OCTOBER TERM, 1995

_____

CHARLES T. ROBINSON,
Petitioner,

v.

SHELL OIL COMPANY,
Respondent.

_____

Petition for Writ of Certiorari to the United States Court of Appeals for the Fourth Circuit

_____

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

_____

This case involves the proper interpretation of a federal statute. Title VII § 704(a) of the Civil Rights Act of 1964, 42 U.S.C. § 2000e-3(a), declares it to be an unlawful employment practice for an employer to discriminate against "any of his employees or applicants for employment" because he has made a charge under Title VII. Does a person who is not an "employee or applicant for employment" have a cause of action under this statute against his former employer?

This case was filed in the United States District Court for the District of Maryland on January 4, 1993.[2] The District Court, Chief District Judge J. Frederick Motz presiding, granted a Motion to Dismiss on April 8, 1993, and entered an order dismissing the case. Robinson filed a Notice of Appeal on May 6, 1993.

On January 18, 1995, a panel of the United States Court of Appeals for the Fourth Circuit issued an Opinion reversing the judgment of the District Court and remanding the case for further proceedings.

On March 1, 1995, the Fourth Circuit granted Shell's Petition for Rehearing En Banc. On November 29, 1995, the Fourth Circuit issued an Opinion affirming the dismissal by the District Court.

In the Petition for Writ of Certiorari, Robinson argues that the term "employees" as used in § 704(a) is ambiguous and should be interpreted liberally to include former employees. The term "employee" is not ambiguous. The statute should not be given a strained construction to include former employees.

[2] The Complaint listed three individuals in addition to Shell as Defendants. However, Robinson did not appeal the dismissal as to these individuals.

CITATION OF OPINIONS

The Opinion of the United States Court of Appeals for the Fourth Circuit, sitting En Banc, issued on November 29, 1995, affirming the judgment in favor of Shell, is published at 70 F.3d 325.

The Opinion of the panel of the United States Court of Appeals for the Fourth Circuit, issued on January 18, 1995, reversing the judgment in favor of Shell and remanding the case, is unpublished. A copy is reprinted in the Appendix to the Petition for Writ of Certiorari.

The Opinion of the United States District Court for the District of Maryland, issued on April 8, 1993, is unpublished. A copy is reprinted in the Appendix to the Petition for Writ of Certiorari.

JURISDICTIONAL STATEMENT

The Supreme Court has jurisdiction to consider the Petition for Writ of Certiorari under 28 U.S.C. § 1254(1).

APPLICABLE STATUTE

This case involves the proper interpretation of a federal statute, Section 704(a) of the Civil Rights Act of 1964, 42 U.S.C. § 2000e-3(a):

> It shall be an unlawful employment practice for an employer to discriminate against any of his employees or applicants for employment, for an employment agency, or joint labor-management committee controlling apprenticeship or other training or retraining, including on-the-job training programs, to discriminate against any individual, or for a labor organization to discriminate against any member thereof or applicant for membership, because he has opposed any practice made an unlawful employment practice by this subchapter, or because he has made a charge, testified, assisted, or participated in any manner in an investigation, proceeding, or hearing under this subchapter.

STATEMENT OF THE CASE

A. THE CHARGE OF DISCRIMINATION

Robinson is a former Territory Sales Representative in Shell's Mid Atlantic Retail Marketing District. His employment was terminated effective October 13, 1991 under a severance program. Following termination of his employment, Robinson filed a charge of discrimination with the Equal Employment Opportunity Commission (hereinafter referred to as the "E.E.O.C."). Robinson alleged that he had been fired on the basis of his race (Black).

The charge of discrimination resulted in a lawsuit, *Robinson v. Shell Oil Company*, Civil Action No. JFM 93-29 in the United States District Court for the District of Maryland. The suit was tried before the Court, Chief District Judge J. Frederick Motz presiding, in April 1994. At the conclusion of the trial, Judge Motz entered a judgment in favor of Shell. There was no evidence of race discrimination. Robinson did not appeal that judgment.

B. THE CHARGE OF RETALIATION

In February 1992, four months after he had been fired from Shell, Robinson applied for a job as an Insurance Account Representative with Metropolitan Life Insurance Company. On February 28, 1992, Metropolitan Life wrote a letter to Shell requesting information regarding Robinson's prior employment. Ross Fava, Sales Manager for Shell, completed a questionnaire in which he stated that Robinson did not leave Shell's employment voluntarily and that Shell would not re-employ Robinson. Fava rated Robinson as below average in nine employment categories. Robinson's attendance was rated as poor.

On March 10, 1992, Robinson filed a second charge with the E.E.O.C. This time Robinson alleged that Shell had given him a poor employment reference because he had previously filed a charge of discrimination against Shell. In other words, Robinson alleged that Shell had retaliated against him for filing his charge of discrimination in violation of the anti-retaliation provision of the Civil Rights Act of 1964, Title VII § 704(a), 42 U.S.C. § 2000e-3(a).

The charge of retaliation resulted in the present lawsuit.

1. PROCEEDINGS BEFORE THE DISTRICT COURT

On January 4, 1993, Robinson filed this suit in the United States District Court for the District of Maryland. This case was also assigned to Chief District Judge Motz. Robinson alleged that Shell had retaliated against him by "providing false information and negative job references to perspective (sic) employers."

On March 23, 1993, Shell filed a Motion to Dismiss in accordance with Rule 12(b)(6) of the Federal Rules of Civil Procedure. Shell argued that Robinson was not employed by Shell at the time the employment reference was made and, therefore, § 704(a) did not apply.

Shell relied upon the case of *Polsby v. Chase*, 970 F.2d 1360 (4th Cir. 1992), *vacated sub nom. Polsby v. Shalala,* 113 S.Ct. 1940, in filing its Motion to Dismiss. The Fourth Circuit opinion in *Polsby* had only recently been issued on August 12, 1992. In *Polsby*, the Fourth Circuit held that the plain wording of § 704(a) stated that it applied to "employees or applicants for employment" and not to former employees.

On April 8, 1993, in reliance on *Polsby*, Chief District Judge Motz granted Shell's Motion to Dismiss and entered an order dismissing the case.

On April 26, 1993, the Supreme Court vacated the Fourth Circuit's judgment in *Polsby* and remanded the case "for further consideration in light of the position asserted by the Acting Solicitor General in his brief for the United States filed March 5, 1993." The Supreme Court did not address the merits of the Fourth Circuit opinion.

On May 6, 1993, Robinson filed a Notice of Appeal to the United States Court of Appeals for the Fourth Circuit.

2. PROCEEDINGS BEFORE A PANEL OF THE FOURTH CIRCUIT

The appeal was argued before a panel comprised of Circuit Judges Hall, Hamilton, and Michael of the Fourth Circuit on September 28, 1994. On January 18, 1995, Judge Hall, writing for the majority of the panel, reversed the judgment of the District Court and remanded the case for further proceedings. Judge Hamilton filed a dissent.

On January 30, 1995, Shell filed a Petition for Rehearing and Suggestion for Rehearing En Banc. On March 1, 1995, the Fourth Circuit vacated the panel decision and granted the suggestion for rehearing en banc.

3. PROCEEDINGS BEFORE THE FOURTH CIRCUIT EN BANC

The appeal was reargued before the Fourth Circuit sitting en banc on September 26, 1995. On November 29,

1995, Judge Hamilton, writing for the majority of the Court, affirmed the judgment of the District Court. Judge Hall filed a dissent, as did Judge Murnaghan.

On February 27,1996, Robinson filed a Petition for Writ of Certiorari with the Supreme Court of the United States.

SUMMARY OF THE ARGUMENT

The plain wording of Title VII § 704(a) of the Civil Rights Act of 1964 protects "employees or applicants for employment" from retaliation by an employer for filing a charge of discrimination. This statute is clear and unambiguous. Under the well established rules of statutory construction, former employees are not protected by the Act. Exclusion of former employees is not contrary to any express intent of Congress. Exclusion of former employees is consistent with other provisions of Title VII. Therefore, the Fourth Circuit, sitting en banc, acted correctly in affirming the dismissal of this suit.

There is a split between the Courts of Appeals on the question of the application of § 704(a) to former employees.

The Petition for Writ of Certiorari should be denied. In the alternative, the Petition for Writ of Certiorari should be granted and the decision of the Fourth Circuit should be summarily affirmed.

ARGUMENT

1. Does Title VII § 704(a) of the Civil Rights Act of 1964 give former employees a cause of action for acts of retaliation allegedly occurring after the employment relationship has ended?

The Fourth Circuit determined that former employees were not protected against retaliation by § 704(a) by setting out the framework for statutory interpretation and then applying that framework to the statute. The Fourth Circuit also recognized other considerations that led to the conclusion that Congress did not intend to extend the coverage of § 704(a) to former employees. Finally, the Fourth Circuit examined the decisions of the other Courts of Appeals on this question.

The examination of this question by the Fourth Circuit was thorough and correct. The Supreme Court should deny the petition for writ of certiorari or summarily affirm the decision.

A. THE FOURTH CIRCUIT OPINION

1. THE RULES OF STATUTORY CONSTRUCTION

The Fourth Circuit recognized that any case involving the proper interpretation of a statute must begin by examining the statutory language. Words should be interpreted according to their common usage. Courts are not free to read into a law what is not there. *K-Mart Corp. v. Cartier, Inc.*, 486 U.S. 281, 291 (1988).

If a term is defined within a statute, that definition controls the meaning of the term whenever it appears in the statute. *Florida Department of Banking & Finance v. Board of Governors of the Federal Reserve System,* 800 F.2d 1534 (11th Cir. 1986).

If the statutory language is unambiguous and the statutory scheme is coherent and consistent, interpretation is unnecessary. The sole function of the court is to enforce the statute according to its terms. *United States v. Ron Pair Enterprises, Inc.*, 489 U.S. 235, 240-41 (1989), *Caminetti v. United States*, 242 U.S. 470, 485 (1917).

There are only two exceptions when a court may stray from the plain language of an unambiguous statute. The first is when literal application of the statute would lead to an absurd result. This exception applies only under rare and exceptional circumstances. The absurdity must be so gross as to shock the general moral or common sense and there must be something to make plain Congress' intent that the letter of the law should not prevail. *Crooks v. Harrelson*, 282 U.S. 55, 60 (1930).

The second exception is when literal application of the statutory language would produce a result demonstrably at odds with the intent of Congress. In such cases, the intention of the legislature, rather than the language of the statute, controls. However, this exception applies only when the contrary intent is clearly expressed by the legislative body. *Russello v. United States*, 464 U.S. 16, 20 (1983). In the absence of express Congressional intent, a court must assume that Congress intended to convey the language's ordinary meaning.

Of course, if the language of the statute is ambiguous, a court may look beyond the language to the legislative history for guidance in interpreting the statute.

2. APPLICATION OF THE RULES TO § 704(a)

(a) "Employee" is defined by 42 U.S.C. § 2000e(f).

The Fourth Circuit recognized that Title VII defines "employee" as "an individual employed by an employer." 42 U.S.C. § 2000e(f). This definition, therefore, controls the meaning of the term throughout the statute. Since Title VII does not define "employee" to include individuals who are *no longer employed* by an employer, a court must presume that Congress intended to exclude individuals who are no longer employed.

(b) The term "employee" does not include former employee in common usage.

There is nothing ambiguous in the phrase, "an individual employed by an employer." In common usage, an individual who is no longer employed by a company is never referred to as an "employee." Any individual, as well as any employer, knows immediately if he is presently employed. If an individual once worked at a company but does so no longer, he is referred to as a former employee or retiree. No former employee would mistakenly refer to himself as an "employee" of his former employer.

(c) There is nothing to indicate that Congress intended to include former employees within the protection of § 704(a).

Neither of the exceptions that will allow a court to stray from the plain language of an unambiguous statute are applicable to § 704(a). Both exceptions are dependent upon an express intent of Congress to include former employees within the protection of the Act. There is no such express Congressional intent.

Certainly, a literal interpretation of the statute would not lead to a result so absurd as to shock the general moral or common sense. Nor would a literal application produce a result demonstrably at odds with the intent of Congress. Title VII is not an all-purpose anti-discrimination statute. It is a narrowly drawn employment law. It protects two classes of persons against retaliation: employees and applicants for employment. Neither of these two classes would be affected by a refusal to expand the protection to a third class of former employees. Employees will still be able to sue employers for retaliation. Applicants for employment will still be able to sue prospective employers for retaliation.

3. OTHER CONSIDERATIONS

(a) Title VII forbids certain employment practices.

The Fourth Circuit noted that the type of practices forbidden by Title VII are particularly related to employment, not post-employment, relationships. Title VII prohibits "unlawful employment practice(s)." An unlawful employment practice is defined, in part, as the failure or refusal "to hire or to discharge any individual, or otherwise to discriminate against any individual with respect to his

compensation, terms, conditions, or privileges of employment." 42 U.S.C. § 2000e-2(a)(1). Title VII protects individuals who are seeking employment or who are already employed. Title VII does not redress discriminatory practices which occur after the employment relationship has ended.

Title VII originally provided only equitable relief such as reinstatement, back pay, and injunctions against further violations. These equitable remedies were particularly suited to making a complainant whole without penalizing the employer. Congress did not intend to punish employers by imposing large monetary awards. In successful Title VII actions, an applicant will be hired; an employee will be promoted or reinstated to a job that was denied. However, it is much more difficult to fashion equitable relief for a former employee.

Since the remedies available under Title VII are not suited for post-employment events, those courts that have recognized a cause of action for former employees have been forced into hair-splitting decisions over what is "reasonably related to the employment." For example, the District of Columbia Circuit has held that the cancellation of a symposium in honor of a former employee could be an act of retaliation that stated a claim for relief under § 704(a).[3] However, the Third Circuit has held barring a former employee from the work place is not reasonably related to the employment so as to form a basis for retaliation under § 704(a).[4] Both decisions seem to be influenced by the ability of the court to fashion relief for the alleged harm.

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[3] *Passer v. American Chemical Society*, 935 F.2d 322, 331 (D.C. Cir. 1991).

[4] *Nelson v. Upsala College*, 51 F.3d 383 (3rd Cir. 1995).

Obviously, Title VII does not offer remedies that are easily adapted to post-employment retaliation claims. This is a strong indication that Congress did not intend to extend the protection of § 704(a) to occurrences after the employment relationship has ended.

(b) There is no "adverse employment action" after the employment relationship has ended.

The Fourth Circuit also noted that the second element of a *prima facie* case of retaliation requires that the employee suffer an "adverse employment action." This element necessarily demands that the adverse action occur during the employment relationship. An employer cannot control the employment of someone who no longer works for him. An employer cannot take an adverse employment action against that person.

4. THE DECISIONS OF OTHER COURTS OF APPEALS

The Fourth Circuit realized that its decision ran counter to the holding of several other Courts of Appeals. However, these contrary decisions were based on broad considerations of policy. Each of these decisions totally disregarded, without explanation, the established analytical framework for statutory construction.

In *Rutherford v. American Bank of Commerce*, 565 F.2d 1162 (10th Cir. 1977), the Tenth Circuit stated merely that a literal reading of the statute would result in a narrow interpretation not justified by its legislative history. The court did not cite anything in the Congressional record regarding legislative history. Instead, the court noted that a remedial statute should be liberally construed. 565 F.2d at 1165.

The Second Circuit relied on *Rutherford* and held that a narrow construction would not give effect to the statute's purpose. *Pantchenko v. C.B. Dolge Company, Inc.*, 581 F.2d 1052, 1055 (2nd Cir. 1978).

The Eleventh Circuit also relied on the prior opinions by the Tenth and Second Circuits and held that a strict interpretation of the statute "would undercut the obvious remedial purposes of Title VII." *Bailey v. USX Corp.*, 850 F.2d 1506, 1509 (11th Cir. 1988).

The Third[5], D.C.[6], and Fifth Circuits[7] have made similar pronouncements in cases involving the identical anti-retaliation provision in the Age Discrimination in Employment Act, 29 U.S.C. § 623(d).

A court may not ignore the plain wording of an unambiguous statute based on its own interpretation of the policy behind the act.

B. THE PETITION FOR WRIT OF CERTIORARI

In his petition for writ of certiorari, Robinson attacks the opinion of the Fourth Circuit by noting that there is a split between Courts of Appeals on the correct interpretation of § 704(a). Robinson also argues that the term "employee" is ambiguous and could include a former employee. Finally,

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[5] *Charlton v. Paramus Board of Education*, 25 F.3d 194, 198-200 (3rd Cir. 1994).

[6] *Passer v. American Chemical Society, supra.*

[7] *EEOC v. Cosmair, Inc., L'Oreal Hair Care Division*, 821 F.2d 1085, 1088 (5th Cir. 1987).

Robinson argues a literal construction of the Act would defeat the purpose of the statute and lead to absurd results.

1. There is a split between Courts of Appeals on this question.

Robinson is correct in pointing out that there is a split between Courts of Appeals as to whether § 704(a) protects former employees from retaliation. The Fourth Circuit acknowledged this split in its decision. However, as discussed above, these contrary opinions totally disregard the established analytical framework for statutory construction.

Like these contrary opinions from other Courts of Appeals, Robinson ignores the analytical framework for statutory construction and bases his argument on his own interpretation of Congressional intent. Like the other Courts of Appeals, Robinson cites no authority for his assertion that exclusion of former employees from the protection of §704 (a) is contrary to the intent of Congress.

2. The term "employee" is not ambiguous.

An argument that § 704(a) is ambiguous is nothing more than wishful thinking. Robinson wishes that the language were ambiguous in order to more easily argue in support of an expansive interpretation.

Robinson cites no authority for his argument that "employee" is ambiguous other than the opinions of the Courts of Appeals contrary to the Fourth Circuit. These cases also cite no authority for this position. The Courts of Appeals have merely declared "employee" to be ambiguous in order to allow them to interpret the statute as they saw fit. This is *a priori* reasoning. Instead of examining the term "employee" according to its ordinary usage, the Courts of

Appeals have avoided analysis of the term in order to further their own belief as to the policy behind the Act.

No layman would confuse a former employee with a current employee. Individuals know if they are employed or not and, if so, by whom. It is absurd to suggest that it is unclear what Congress meant by prohibiting an employer from retaliating against "his employees."

The situation is analogous to arguing that the term "married" could refer to someone who is no longer married. Any individual knows if they are married or not. If an individual was married at one time but is no longer, he would referred to himself as single or separated or divorced, but never "married."

3. There is no express Congressional intent to include former employees within the protection of § 704(a).

Without acknowledging the rules of statutory construction or the exceptional circumstances under which a court may stray from the plain wording of an unambiguous act, Robinson argues that a literal construction of § 704(a) would defeat the purpose of the statute and lead to absurd results.

Robinson fails to recognize that these exceptional circumstances arise only when Congress has expressed an intent contrary to the plain wording of the Act. There is no express Congressional intent to include former employees within the protection of § 704(a).

An examination of the wording of § 704(a) would indicate that Congress did not intend to include former employees within its protection. Section 704(a) uses four

nouns to describe persons protected against retaliation: individual, member, applicant, and employee. The term "employee" is arguably the most restrictive.

Employment agencies and joint labor-management committees are prohibited from discriminating against any "individual." Labor organizations are prohibited from discriminating against any "member" or "applicant for membership." Employers are prohibited from discriminating against any of "his employees or applicants for employment."

Had Congress intended to prohibit discrimination by an employer against former employees, it could have easily included the term "former employee" along with "his employees or applicants for employment." Alternatively, Congress could have substituted the term "individual" for "his employees or applicants for employment."

This last suggestion is exactly what Congress has done in recent employment legislation. Both the Americans with Disabilities Act of 1990, 42 U.S.C. § 12203, and the Family and Medical Leave Act of 1993, 29 U.S.C. § 2615, prohibit retaliation against any "individual." There is no question that these statutes would protect former employees from retaliation.

4. A literal construction of "employee" does not defeat the purpose of the statute.

Robinson offers several hypothetical examples in support of his argument that former employees should be able to sue their former employers. Most of these examples involve bad employment references by the former employer. Robinson argues that it would be unfair to allow the former employers to affect the ability of an individual to get a job. Robinson ignores the fact that § 704(a) does allow a cause of

action against a *prospective* employer for failure to hire an applicant because the applicant had previously filed a charge, participated in an investigation, etc.

Congress clearly intended to protect an applicant who is rejected for a job by providing for damages against the prospective employer only and not against the former employer even if the prospective employer learned of the protected activity from the former employer.

It is naive to think that an employer will not harbor some resentment against a former employee who accuses it of discrimination. It is also unrealistic to think that an employer will issue a favorable employment reference for a former employee who has accused it of discrimination. However, it may well be that Congress recognized that a former employee is sufficiently protected against false statements by the laws of defamation and that a former employee is not entitled to protection against a true statement, regardless of the motivation.

5. A broad construction of "employee" would contradict other provisions of Title VII.

Under 42 U.S.C.§ 2000e(b), Title VII applies to employers with "15 or more employees." Under Robinson's construction of the term "employee", Title VII would apply to any employer with 15 or more current or former employees. This would be a dramatic expansion of the Civil Rights Act of 1964.

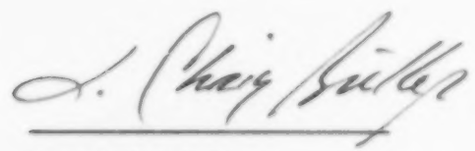
CONCLUSION

The wording of § 704(a) is clear and unambiguous. Former employees are not protected against retaliation under the Act. The opinion of the Fourth Circuit is correct.

The Petition for Writ of Certiorari should be denied.

In the alternative, the Petition for Writ of Certiorari should be granted and the decision of the Fourth Circuit should be summarily affirmed.

Respectfully submitted,



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No. 95-1376

Supreme Court, U.S.
FILED
JUN 21 1996
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IN THE

Supreme Court of the United States

OCTOBER TERM, 1995

CHARLES T. ROBINSON, SR.,

Petitioner,

v.

SHELL OIL COMPANY,

Respondent.

On Writ of Certiorari to the United States Court of Appeals for the Fourth Circuit

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JOINT APPENDIX

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LOCATION OF ADDITIONAL RECORD EXCERPTS NOT INCLUDED IN THE JOINT APPENDIX

3. Opinion of the United States Court of Appeals for the Fourth Circuit (in banc), November 29, 1995, reprinted in the Appendix to the Petition for a Writ of Certiorari at pages A-1 to A-29.

4. Opinion of the United States Court of Appeals for the Fourth Circuit (panel), January 13, 1995, reprinted in the Appendix to the Petition for a Writ of Certiorari at pages A-30 to A-61.

5. Memorandum of the United States District Court for the District of Maryland, April 8, 1993, reprinted in the Appendix to the Petition for a Writ of Certiorari at pages A-62 to A-63.

6. Order of the United States Court of Appeals for the Fourth Circuit (granting petition for rehearing and suggestion for rehearing in banc) entered March 1, 1995, reprinted in the Appendix to the Petition for a Writ of Certiorari at pages A-64 to A-63.

RELEVANT DOCKET ENTRIES

United States District Court for the District of Maryland

1/8/93	COMPLAINT FILED
1/25/93	MOTION by Charles T. Robinson, Sr. for appointment of counsel.
3/24/93	MOTION with memorandum in support by Shell Oil Company to Dismiss for Failure to State a Claim
4/8/93	MEMORANDUM (signed by Judge J. F. Motz)
4/8/93	ORDER granting motion of Defendant to Dismiss for Failure to State a Claim; and DISMISSING this Action.
5/7/93	NOTICE OF APPEAL by Charles T. Robinson, Sr.

United States Court of Appeals for the Fourth Circuit

5/11/93	Civil case docketed.
12/14/93	Motion filed by Appellant Charles T. Robinson to proceed on appeal in forma pauperis
1/6/94	COURT ORDER filed denying motion to proceed on appeal ifp.
2/3/94	Appearance form filed by Allen Martin Lenchek for Appellant Charles T. Robinson.

4/7/94	Brief and joint appendix filed by Appellant Charles T. Robinson.
4/25/94	Motion filed by Amicus Curiae EEOC to file brief in its present form.
5/11/94	CLERK ORDER FILED granting motion to file brief as is.
5/11/94	Amicus curiae brief filed by Amicus Curiae EEOC.
5/19/94	Brief filed by Appellee Shell Oil Company.
7/7/94	Supplemental authorities (FRAP 28(j)) filed by Appellant Charles T. Robinson.
8/19/94	Motion filed by Amicus Curiae EEOC to participate in oral argument.
8/29/94	COURT ORDER filed granting motion by EEOC to participate in oral argument on time ceded by appellant.
9/28/94	Oral argument heard.
1/18/95	Published, authored opinion filed.
1/18/95	Judgment order filed.
1/31/95	Petition filed by Appellee Shell Oil Company for rehearing and suggestion for rehearing in banc.
3/195	COURT ORDER filed granting motion for rehearing, granting motion for suggestion for rehearing in banc.

3/1/95	Case reopened.
4/6/95	COURT ORDER filed amending order granting motion for rehearing, motion for suggestion for reh in banc.
9/5/95	Motion filed by Amicus Curiae EEOC to participate in oral argument.
9/6/95	COURT ORDER filed granting motion to participate in oral argument.
9/26/95	Oral argument heard.
11/29/95	Published, authored opinion filed.
11/29/95	Judgment order filed. Decision: Affirmed, with 2 dissents.
2/6/96	Federal Reporter Citation: 70 F.3d 325.
2/8/96	Mandate issued.

[Pro Se Complaint filed January 8, 1993, United States District Court for the District of Maryland]

[Caption Omitted]

COMPLAINT FOR RETALIATION

NOW COMES, Plaintiff, brings the complaint for racial discrimination and wrongful retaliation and avers the following:

JURISDICTION

1. This action for damages based on racial discrimination and wrongful retaliation committed by the defendants, and jurisdiction of this court is invoked pursuant to the provisions of Title VII of the Civil Rights Act of 1964, USCS, Section 2000 E, et al..

2. That jurisdiction of this court is further invoked under Title 28 United States Code, Section 1331, in that the amount of controversy exceeds the amount of $100,000.00, inclusive of interest and cost, arise under the Constitution and laws of the United States.

3. That Plaintiff is a black male of African descent and color, a citizen of the United States, and a resident of Maryland, with his post office address at 8650 Hayshed Lane, Columbia Maryland, 21045.

4. That the defendant Shell Oil Company, a Delaware Corporation, with main offices in Houston, Tx. and a subsidiary of Royal Dutch Shell Trading company of the Netherlands, authorized and registered to do business within the State of Maryland.

5. Defendant Ross Fava, at all times alleged in this complaint, was and is currently, an employee or defendant Shell Oil Company. Moreover, defendant Fava, at all times alleged in this complaint, was acting within the scope of his employment and on behalf of defendant Shell Oil Company.

STATEMENT OF FACTS

6. That at all times hereinafter Plaintiff is, and has been for eleven (11) years and seven (7) months an employee of defendant Shell Oil Company.

7. That Plaintiff was a hardworking, loyal, honest, knowledgeable employee of defendant Shell Oil Company, with many company awards, recognitions, laurel citations to his credits.

8. That on October 7, 1991, Plaintiff filed a charge with the Equal Employment Opportunity Commission (EEOC) against defendant Shell Oil Company, for racial discrimination, charge #12092-0029.

9. That since October 7, 1991, without grounds or justification, defendant Shell Oil Company has been providing false information and negative job references to perspective employers.

10. That on March 10, 1992, Plaintiff file charge, charge #12092-0769, for retaliation against in violating section 704 (A) of Title VII of the Civil Rights Act of 1964.

11. That Plaintiff having complied with all the prerequisites, was issued a Notice of Right to Sue, as pursuant to Title VII of the Civil rights Act of 1964.

WHEREFORE, the Plaintiff request:

1. That this court grant the Plaintiff a judgement against defendant Shell Oil Company in the sum of $25,000,000.00 as damages in this case together with such other reliefs as the Court deems appropriate.

2. That this Court grant the Plaintiff a judgment against defendant Ross Fava in the sum of $5,000,000.00 as damages in this case together with such other reliefs as the court deems appropriate.

3. That the defendant should be permanently

enjoined from engaging in similar unlawful practices.

4. That this Court award Plaintiff reasonable attorney fees and Court cost and any other costs deemed appropriate by this Honorable Court.

RESPECTFULLY SUBMITTED

/S/
Charles T. Robinson, Sr.

No. 95-1376

Supreme Court, U.S.
FILED
JUN 21 1996

IN THE

Supreme Court of the United States

OCTOBER TERM, 1995

CHARLES T. ROBINSON, SR.,
Petitioner,

v.

SHELL OIL COMPANY,
Respondent.

On Writ of Certiorari to the United States Court of Appeals for the Fourth Circuit

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QUESTION PRESENTED

Does the term "employees" in section 704(a) of Title VII of the Civil Rights Act of 1964, making it unlawful for an employer to discriminate against any of his employees or applicants for employment because they have exercised rights accorded them by Title VII, include former employees?

PARTIES TO THE PROCEEDING

The parties to the proceeding are:

Charles T. Robinson, Sr., Plaintiff below, Petitioner here.

Shell Oil Company, Defendant below, Respondent here.

Shell Oil Company is wholly owned by Shell Petroleum Inc. Shell Petroleum Inc. is directly or indirectly owned 60% by Royal Dutch Petroleum Company and 40% by the "Shell" Transport and Trading Company, p.l.c., which are publicly traded companies. Shell Oil Company has no subsidiaries which are less than wholly owned.

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No. 95-1376

IN THE

Supreme Court of the United States

OCTOBER TERM, 1995

CHARLES T. ROBINSON, SR.,

Petitioner,

v.

SHELL OIL COMPANY,

Respondent.

On Writ of Certiorari To The United States Court of Appeals for the Fourth Circuit

BRIEF FOR PETITIONER

OPINIONS BELOW

The November 29, 1995 in banc opinion of the court of appeals is set forth in the Appendix to the Petition for Writ of Certiorari ("Pet. App.") at pp. A-1 to A-29, and is reported at 70 F.3d 325 (1996). The unreported panel opinion of January 18, 1995, is set forth at Pet. App. A-30 to A-61. The district court opinion is set forth at Pet. App. A-62 to A-61.

JURISDICTION

Jurisdiction is conferred by 28 U.S.C. § 1254(1).

STATUTORY PROVISION INVOLVED

Section 704(a) of the Civil Rights Act of 1964, 42 U.S.C. § 2000e-3(a), provides:

> It shall be an unlawful employment practice for an employer to discriminate against any of his employees or applicants for employment, for an employment agency, or joint labor-management committee controlling apprenticeship or other training or retraining, including on-the-job training programs, to discriminate against any individual, or for a labor organization to discriminate against any member thereof or applicant for membership, because he has opposed any practice made an unlawful employment practice by this subchapter, or because he has made a charge, testified, assisted, or participated in any manner in an investigation, proceeding, or hearing under this subchapter.

STATEMENT OF THE CASE

Petitioner Charles T. Robinson, Sr. was employed by Shell Oil Company as a Territory Sales Representative. He was terminated on October 13, 1991. He immediately filed a charge of discrimination with the Equal Employment Opportunity Commission (EEOC) charging Shell with racial discrimination, alleging that he had been fired because of his race (Black).

A few months after he filed his EEOC charge, petitioner applied for a job with Metropolitan Life Insurance Company. Metropolitan Life indicated that it would hire petitioner, contingent on the reference Shell gave him. Metropolitan Life requested Shell to complete a questionnaire regarding petitioner's job performance. Shell,

however, gave petitioner the lowest possible ratings in each category and indicated that it would not re-employ him. Metropolitan Life thereupon refused to hire petitioner.

Petitioner subsequently filed a second charge with the EEOC, charging Shell with having given him a poor reference in retaliation for his first charge. On January 4, 1993, petitioner filed a *pro se* complaint in the United States District Court for the District of Maryland, alleging that Shell violated section 704(a) of the Civil Rights Act of 1964, Title VII, 42 U.S.C. § 2000e-3(a), by "providing false information and negative job references" to prospective employers.[1] Joint Appendix ("JA") 5a, 6a. Shell promptly moved to dismiss for failure to state a claim upon which relief can be granted, asserting that petitioner's retaliation complaint was not covered by Title VII because his employment with Shell was terminated prior to the alleged negative references and that section 704(a) does not cover former employees. JA 2a. The district court granted Shell's motion on April 8, 1993, relying on the Fourth Circuit's decision in *Polsby v. Chase*, 970 F.2d 1360 (4th Cir. 1992), which it concluded had "expressly held that Title VII does not confer upon an ex-employee a cause of action against a former employer for acts of retaliation allegedly committed after the employment relationship has ended." Pet. App. A-62. The District Court noted that "other Circuits have held to the contrary, [but] this court is, of course, bound by the law of the Fourth Circuit." Pet. App. A-62 to A-63. Petitioner noted a timely appeal. JA 2a.

Eighteen days after the District Court dismissed petitioner's suit, *Polsby* was vacated by this Court. ___ U.S. ___, 113 S.Ct. 1940 (1993).

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[1]Petitioner brought a separate action concerning his termination from Shell Oil. After trial, judgment was entered for Shell Oil.

On petitioner's appeal, a panel of the Fourth Circuit reversed. Pet. App. A-30 to A-61. Shell petitioned for rehearing in banc. JA 3a. On rehearing in banc, the Fourth Circuit affirmed the District Court, with two dissents. Pet. App. A-1 to A-29. A timely petition for certiorari was granted on April 22, 1996.

SUMMARY OF ARGUMENT

The statutory definition of "employee" in Title VII, "an individual employed by an employer," 42 U.S.C. § 2000e(f), can literally mean "an individual formerly employed," because "employed" is both the past and present tense, passive voice and the past tense, active voice of the verb "employ." In common usage, "employee" often means an individual who is not currently performing work for an employer. This Court has repeatedly used the term to refer to former employees, *e.g.*, pensioners, *Public Employees Retirement Sys. v. Betts*, 492 U.S. 158 (1989), individuals who were unemployed, *Nash v. Florida Industrial Comm'n*, 389 U.S. 235 (1967), retired workers, *Fleming v. Nestor*, 363 U.S. 603 (1960), unemployed disabled workers, *Richardson v. Belcher*, 404 U.S. 78 (1971), and social security beneficiaries, *Bowen v. Public Agencies Opposed to Social Sec. Entrapment*, 477 U.S. 41 (1986), as well as applicants for employment. *Chemical Workers v. Pittsburgh Plate Glass*, 404 U.S. 157, 168 (1971).

The term "employee" is used in nine places in Title VII to refer to former employees. Section 717(c) literally gives only federal "employees" or applicants for employment the right to sue under Title VII. Section 717(b)(3) provides for notification of final agency action on a discrimination complaint to be given only to "employees" or applicants for employment. In each instance, the word "employee" must

mean former as well as current employees or federal employees who have been discharged would not be able to exercise the rights afforded by Title VII. Section 717(a) prohibits discrimination against "employees" and applicants for employment in federal employment. This cannot mean that a federal agency may lawfully discriminate against a retired federal employee. Sections 706(g)(1) and 717(b) provide for the "reinstatement" of "employees." Only former employees can be "reinstated." Section 714 protects EEOC "employees" against violent reprisals for their official actions. Congress surely did not intend to allow such reprisals against former EEOC employees. Sections 706(b) and 709(e) contain confidentiality provisions applicable to EEOC "employees." Surely former EEOC employees are not relieved of such requirements. In each instance, the term "employee" is used when clearly "employee or former employee" is meant. The meaning of "employee" in section 704(a) can only be determined by examination of the text and purpose of the section.

Section 704(a) is intended to promote enforcement of Title VII. Section 704(a) covers the charge filed by petitioner since retaliation against the petitioner on account of that charge would be unlawful under section 704(a) if committed by an employment agency, a joint labor-management committee, or a union of which petitioner was a member. No rational reason appears why Congress would bar all these entities from retaliating against an individual who filed such a charge but would nonetheless allow an employer to so retaliate.

A threat that filing charges or cooperating with the EEOC will lead to retaliation would strongly deter aggrieved individuals from filing charges. If former employees were not protected from retaliation, employers could retaliate against a former employee by terminating his or her severance pay or medical insurance, cutting off retirement

benefits, seeking revocation of a professional license, persuading a subsequent employer to discharge the employee, filing a baseless civil suit, orchestrating the groundless arrest and criminal prosecution of the employee, or even resorting to physical violence, all without violating Title VII. If employers could legally retaliate against former employees for filing EEOC charges, they could promulgate and announce an official written policy of retaliating against any former employee if he or she files a charge, thereby effectively gutting Title VII. The lower court's interpretation of section 704(a) gives employers an incentive to fire any employee who might intend to file an EEOC charge, since dismissed employees could be openly intimidated from filing charges.

The lower court erred in reasoning that section 704(a) does not protect former employees from post-employment retaliation by their former employers because Title VII assertedly does not redress discrimination that takes place after the employment relationship has ended. This Court has squarely ruled to the contrary in *Hishon v. King & Spalding*, 467 U.S. 69 (1984), holding that a benefit of employment that accrues after a person's employment ends can be a term, condition, or privilege of employment, and therefore be protected against discriminatory treatment under Title VII. If an employer chooses to include post-employment references among the privileges of employment, it cannot dole out that benefit in a discriminatory manner. Consequently, since a claim of discrimination in regard to a post-employment job reference would be cognizable under the substantive prohibitions of Title VII, a claim of retaliation for making such a claim must be cognizable under section 704(a).

The anti-retaliation provisions of federal labor law have traditionally been broadly construed. *NLRB v. Scrivener*, 405 U.S. 117 (1972); *Bill Johnson's Restaurants,*

Inc. v. NLRB, 461 U.S. 731 (1983); *Phelps Dodge Corp. v. NLRB*, 313 U.S. 177 (1941); *Public Employees Retirement Sys. v. Betts*. In doing so, this Court has on several occasions construed the term "employee" to include former employees. *E.g., Nash v. Florida Industrial Comm'n*. Such a construction of section 704(a) is necessary to give effect to the purposes of Title VII.

ARGUMENT

INTRODUCTION

The anti-retaliation provision of Title VII of the Civil Rights Act of 1964, 42 U.S.C. § 2000e *et seq.*, is contained in section 704(a) of the Act. It provides, in part,

> It shall be an unlawful employment practice for an employer to discriminate against any of his employees or applicants for employment, . . . because he has made a charge, testified, assisted, or participated in any manner in an investigation, proceeding, or hearing under this subchapter.

42 U.S.C. § 2000e-3(a). In the decision under review, the Fourth Circuit construed this provision as not applying to former employees on the grounds that the definitional section of Title VII defines "employee" as "an individual employed by an employer." 42 U.S.C. § 2000e(f). Therefore, the lower court reasoned, the term "employee" in Title VII cannot include "an individual *no longer employed* by an employer." Pet. App. A-11 (emphasis in the original). The Fourth Circuit based its decision on the premise that the term "employee" in Title VII admits of no more than one meaning — an individual currently employed by an employer, and that this is the meaning of "employee"

everywhere that it appears in Title VII. Pet. App. A-11. This assertion is demonstrably wrong. The word "employee" appears in Title VII nine times in circumstances where it clearly cannot be limited to current employees and it is commonplace for courts, including this Court, as well as Congress and others, to use the term "employee" to refer to former employees as well as to current and future employees.

I. USE OF THE TERM "EMPLOYEE" TO DENOTE THE INDIVIDUALS PROTECTED BY SECTION 704(a) DOES NOT PRECLUDE PROTECTION OF FORMER EMPLOYEES

A. In Common Usage "Employee" Often Includes Former Employees

This Court has repeatedly observed that the word employee "is not treated by Congress as a word of art having a definite meaning"; rather, "it takes color from its surroundings . . . [in] the statute where it appears." *NLRB v. Hearst Publications*, 322 U.S. 111, 124 (1944)(*quoting United States v. American Trucking Ass'ns*, 310 U.S. 534, 545 n. 29 (1940)).[2] The meaning of "employee" "derives from the context of [the statute in which it is found], which 'must be read in the light of the mischief to be corrected and the end to be attained.'" *NLRB v. Hearst Publications*, 322 U.S. at 124 (*quoting South Chicago Coal & Dock Co. v. Bassett*, 309 U.S. 251, 259 (1940)).

[2] See also *United States v. Silk*, 331 U.S. 704, 714 (1947)("The word 'employee' . . . was not . . . used [in the NLRA] as a word of art, and its content in its context was a federal problem to be construed 'in the light of the mischief to be corrected and the end to be attained.'")

This Court has often used the term "employee" to refer to former employees. In *Nash v. Florida Industrial Comm'n*, 389 U.S. 235 (1967), this Court described as an "employee" an individual who had lost her job and was seeking unemployment compensation:

> Florida has applied its Unemployment Compensation Law so that *an employee* who believes he has wrongly been discharged has two choices: (1) he may keep quiet and receive unemployment compensation until he finds a new job, or (2) he may file [a] . . . charge . . . and risk financial ruin.

389 U.S. at 239 (emphasis added). In *Hobbie v. Unemployment Appeals Comm'n of Fla.*, 480 U.S. 136 (1987), the Court explained the plight of the jobless plaintiff in *Sherbert v. Verner*, 374 U.S. 398 (1963), as being that "the *employee* was deemed completely ineligible for benefits under South Carolina's unemployment insurance scheme." 480 U.S. at 142 (emphasis added). In *California Human Resources Dep't. v. Java*, 402 U.S. 121 (1971), the Court described the state's process for ruling on unemployment compensation claims as follows: "the preliminary interview . . . to examine the claimant's eligibility . . . is an occasion when the claims of both the employer and *the employee* can be heard. . . ." 402 U.S. at 134 (emphasis added).[3]

This Court has in other contexts as well used the term "employee" in this way. *Fleming v. Nestor*, 363 U.S. 603 (1960), considered the constitutional claims of a retired worker who had been stripped of his social security old-age benefits. "The interest of a covered *employee* under the Act

[3] "The objective of Congress was to provide a substitute for wages lost during a period of unemployment not the fault of the *employee*." 402 U.S. at 130 (emphasis added).

is of sufficient substance to fall within the protection from arbitrary governmental action afforded by the Due Process Clause." 363 U.S. at 611 (emphasis added). In *Richardson v. Belcher*, 404 U.S. 78 (1971), the Court explained that the federal program for former workers no longer physically or mentally able to make a living distinguished "between those disabled *employees* who receive workmen's compensation and those who receive compensation from private insurance." 404 U.S. at 81 (emphasis added).[4] In *Geduldig v. Aiello*, 417 U.S. 484 (1974), the Court upheld the authority of state programs for disabled workers to fix "the benefit level deemed appropriate to compensate *employee* disability." 417 U.S. at 494 (emphasis added). In *Bowen v. Public Agencies Opposed to Social Sec. Entrapment*, 477 U.S. 41 (1986), the Court explained that the social security law had been amended to prohibit states and localities from withdrawing from the system because "Congress believed that sound social policy required protection of *employees* who move from job to job." 477 U.S. at 47 (emphasis added).[5]

This Court has also referred to a number of instances in which the word "employee" was used in legislation to encompass individuals who no longer work for an employer. *Allied Chemical Workers v. Pittsburgh Plate Glass*, 404 U.S. 157, 169 (1971)(*citing Blassie v. Kroger Co.*, 345 F. 2d 58, 70 (8th Cir. 1965)(retired workers are

[4] The Court stated that the statute limits benefits to "80% of the *employee's* average earnings prior to the disability." 404 U.S. at 83 (emphasis added).

[5] The Committee report summarized in this sentence clearly concerned a worker who leaves the employ of state or local government for other work, not one who works for the same government employer in a series of different positions. The passage quoted above would make no sense unless understood in this manner. *See* H.R. REP. NO. 98-25, 98th Cong., 1st Sess., at 19 (1983).

"employees" for the purpose of section 302(c)(5) of the Labor Management Relations Act)); *United States v. American Trucking Ass'ns*, 310 U.S. at 546 n.29 (*citing Nashville, C & St. L. Ry. v. Railway Employees' Dept.*, 93 F. 2d 340 (6th Cir. 1937)(furloughed workers are "employees" within the meaning of the Railway Labor Act)).[6]

This Court has also used the term "employee" to refer to prospective or future, rather than current, employees.

> [A]pplicants for employment and registrants at hiring halls—who have never been fired in the first place—as well as persons who have quit or whose employers have gone out of business are . . . members of the active work force available for hire and at least in that sense could be identified as "employees."

Chemical Workers v. Pittsburgh Plate Glass Co., 404 U.S. at 168 (1971). Under the National Labor Relations Act "'employee' includes job applicants." *NLRB v. Town & Country Elec., Inc.*, ___ U.S. ___, 116 S. Ct. 450, 452 (1995)(*citing Phelps Dodge Corp. v. NLRB*, 313 U.S. 177, 185-86 (1941)).

[6] See *United States v. Griffith*, 2 F.2d 925, 927 (Ct. App. D.C. 1924)(former employee receiving disability payments is an "employee" of the District of Columbia for purposes of common law rule prohibiting employees from sitting on criminal juries); *McPherson Hotel Co. v. Smith*, 127 N.J. Eq. 167, 12 A.2d 136 (Ct. Chancery 1940)(dismissed striker is still an "employee" for purposes of state law prohibiting injunction to stop picketing based on a dispute "between employer and employee"); *United Firefighters v. Los Angeles*, 231 Cal. App. 3d 1976, 283 Cal. Rptr. 8, 12 (Ct. App. 1991)(dismissed firefighter is an "employee" under collective bargaining agreement authorizing "employees" to file grievances).

Congress, too, has repeatedly used the term "employee" to mean former employee. The Employee Retirement Income Security Act (ERISA) defines an "employee pension benefit plan" as one that "provides retirement income to employees," 29 U.S.C. § 1002(2)(A), and defines "employee," as does Title VII, as an "individual employed by an employer." 29 U.S.C. § 1002(6). Yet in this context "employee" can only mean a former or retired employee, since virtually no pension plans provide income to individuals who still hold regular positions with the firm.

Similarly, 5 U.S.C. § 7703(a)(1), enacted as part of the Civil Service Reform Act of 1978, provides that "[a]ny employee or applicant for employment adversely affected or aggrieved by a final order or decision of the Merit Systems Protection Board may obtain judicial review of the order or decision." Section 7703(b) provides that such review shall be obtained by filing a petition for review in a court of appeals except for a case of discrimination arising, *inter alia*, under Title VII, which shall be filed in federal district court. Cases arising under this provision are ones involving disciplinary actions against federal employees, including cases in which the employee has been removed and who is, therefore, necessarily a former employee.[7]

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[7] 5 U.S.C. §§ 4303 and 7513 provide that an "employee" who has been removed for unacceptable performance or for cause is "entitled to appeal the action to the Merit Systems Protection Board under section 7701." Section 7701(a) states that "An employee, or applicant for employment, may submit an appeal to the Merit Systems Protection Board under any law, rule or regulation." Once again, "employee" necessarily includes persons who have been removed from the federal service and who are, therefore, former employees.

Doubtless the use of the term "employee" to refer to a former employee might be characterized as "colloquial,"[8] but four members of the court of appeals below, judges well familiar with common and legal usage, thought former employees to be among the individuals who might in practice be denoted by that word. Pet. App. A-27, A-29. No member of the majority below differed with that characterization of the way in which "employee" is often utilized. If this were not among the accepted meanings of "employee," it would be exceedingly strange for eight Circuits to have applied to former employees the protections established by section 704(a) for "employees" without remarking upon the existence of any such semantic problem.[9]

B. The Term "Employee" is Repeatedly Used in Title VII to Mean "Current, Future or Former Employee"

The term "employee" appears a total of forty-four times in the body of Title VII. Far from demonstrating that Congress understood or intended the term to have a single uniform meaning, the diverse provisions of Title VII make

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[8] *Pantcheko v. C.B. Dolge Co.*, 581 F.2d 1052, 1055 (2d Cir. 1978).

[9] *Charlton v. Paramus Bd. of Educ.*, 25 F.3d 194 (3d Cir. 1994); *EEOC v. Ohio Edison Co.*, 7 F.3d 541 (6th Cir. 1993); *Christopher v. Stouder Mem. Hosp.*, 936 F.2d 870 (6th Cir. 1991); *Passer v. American Chemical Soc'y*, 935 F.2d 322 (D.C. Cir. 1991); *EEOC v. J.M. Huber Corp.*, 927 F.2d 1322 (5th Cir. 1991); *Sherman v. Burke Contracting, Inc.*, 891 F.2d 1527 (11th Cir. 1990); *Bailey v. USX Corp.*, 850 F.2d 1506 (11th Cir 1988); *EEOC v. Cosmair, Inc., L'Oreal Hair Care Div.*, 821 F.2d 1085 (5th Cir. 1987); *O'Brien v. Sky Chefs, Inc.*, 670 F.2d 864 (9th Cir. 1982); *Pantcheko v. C.B. Dolge Co.*, 581 F.2d 1052 (2d Cir. 1978); *Rutherford v. American Bank of Commerce*, 565 F.2d 1162 (10th Cir. 1977).

clear that the word in fact is utilized in a number of distinct ways throughout the statute.

In nine instances the word "employee" is used in Title VII in circumstances which clearly encompass former employees. Section 717(c), regarding discrimination in federal employment, literally gives only "an employee or applicant for employment" a right to file a civil action if he or she is aggrieved by the final disposition of a complaint. Here the term "employee" must include former employees or the Act would give discharged employees no right of action for discrimination that occurred before being terminated or for a discriminatory discharge.

Section 717(b)(3) provides for notification of federal agency final action on an EEO complaint to be given only to an "employee or applicant for employment." This use of the term "employee" cannot mean that terminated or retired employees are not entitled to such notice.

Section 717(a) forbids employment discrimination against "employees or applicants for employment" by federal agencies. This cannot mean that a federal agency may discriminate against a retired federal worker with regard to, say, pensions or disability benefits.

Sections 706(g)(1) and 717(b) authorize as remedies the "reinstatement . . . of employees." These provisions must mean "reinstatement of former employees." Current employees obviously cannot be "reinstated."

Section 714 provides that "sections 111 and 1114, Title 18, shall apply to officers, agents, and employees of the [EEOC] in the performance of their official duties." The referenced sections of Title 18 protect employees and former employees of identified federal agencies from violence directed against such individuals on account of the performance of their official duties. Since § 111 expressly

protects government workers after they leave office, section 714 is not limited to protecting only current EEOC employees from violent reprisals.

Sections 706(b) and 709(e) similarly contain provisions literally applicable only to "employees" but which clearly mean "employees or former employees." Section 706(b) prohibits "employees" of the EEOC from disclosing things said or done during informal conciliation efforts by the EEOC and section 709(e) contains two separate provisions barring "employees" of the Commission from disclosing information obtained by the Commission during an investigation. Presumably, an employee of the Commission is not relieved of these confidentiality provisions when he or she leaves the employ of the Commission.

In each of these provisions, the term "employee" is used when clearly "employee or former employee" is meant. The framers of Title VII manifestly chose to use a single term in a variety of senses without recourse to modifying adjectives such as "past," "current," "prospective" or "future."

Conversely, there are a number of provisions of Title VII in which the term "employee" necessarily refers to future, rather than current or former employees. Section 701(c) defines an employment agency, *inter alia*, as "any person regularly undertaking . . . to procure employees for an employer or to procure for employees opportunities to work for an employer." Here "employees" refers to individuals who would subsequently become employees if the agency were successful in finding them work. Obviously this provision is not limited to firms that find work for individuals who already have jobs with other employers. Similarly, section 701(e) provides that a labor organization shall be deemed to be engaged in an industry affecting commerce if it "maintains or operates a hiring hall or hiring

office which procures employees for an employer or procures for employees opportunities to work for an employer." 42 U.S.C. § 2000e(e). Here too, "employee" must refer to future employment. As with employment agencies, hiring halls ordinarily operate to provide job placement for individuals who are not current employees at the time the assistance is given.

Section 703(e)(1) specifies that it is not an unlawful employment practice for an employer to "hire . . . employees" on the basis of religion, sex or national origin provided those criteria are bona fide occupational qualifications. The BFOQ clause is not, of course, limited to the hiring of individuals who are already employees of some other employer. Here "employee" refers not to their status prior to being hired (as in "hire a college graduate") but their status subsequent to being hired. The same is true of section 703(e)(2), which permits certain employers to "hire . . . employees of a particular religion." 42 U.S.C. § 2000e-2(e)(1). Sections 706(g)(1) and 717(b) list "hiring of employees" as among the remedies available for employment discrimination. Manifestly this speaks not about hiring existing employees away from other employers; workers who already have jobs are the least likely to seek such a hiring remedy.

On the other hand, there are provisions of Title VII whose very terms make clear that the word employee does there refer only to a current employee. Section 701(b) defines employer as an entity which has "fifteen or more employees *for each working day*" (emphasis added). Section 702(b) refers to "employees *in a workplace*" (emphasis added). Section 703(h) permits the use of different standards of compensation for "employees *who work* at different locations" (emphasis added). Section 709 authorizes the EEOC to provide reimbursement to state "agencies and their employees *for services rendered* to assist

the Commission" (emphasis added). Section 711 requires employers to post certain notices "in conspicuous places upon its premises where notices to employees . . . are customarily posted." Section 717(b) directs federal agencies to establish a plan "to provide a maximum opportunity for employees to advance so as to perform at their highest potential."

Consequently, it cannot be said that the term "employee" means "current employee" *everywhere* in Title VII. The Fourth Circuit was clearly wrong in holding that a definition of "employee" that excludes former employees "controls the meaning of 'employee' whenever it appears throughout the statute." Pet. App. A-11. The meaning of the term must be determined by the statutory context. In sum, although "employee" is at times used in Title VII to refer exclusively to current employees, that is far from the only way in which the term is utilized in the statute. The proper meaning to be attached to the term must be gleaned, not from any inherent clarity in the word, but from the context provided by the specific statutory provision in which the word is used.

C. The Statutory Definition Contains An Inherent Ambiguity Based On The Multiple Possible Meanings Of The Term "Employed."

The court of appeals based its statutory analysis largely on the provision of Title VII defining an "employee" as "an individual employed by an employer." 42 U.S.C. § 2000e(f). The pivotal word "employed," the court below reasoned, was "plain," "clear," "not ambiguous," and "admits of no more than one meaning"—i.e., "perform*ing* work under an employer-employee relationship." Pet. App. A-7, A-9, A-11, A-12 (emphasis supplied). This assertion misapprehends the tense and voice in which the definitional section uses the past participle of the verb "employ" in the adjectival phrase

modifying the term "individual."

As the Fourth Circuit explicates the pivotal word ("employed") in the statutory definition, it is the present tense and passive voice form of the verb "employ." Thus, the Fourth Circuit chooses the present participle of the verb "perform" to explain that "an individual employed by an employer" is a person presently "performing work under an employer-employee relationship."

This understanding of the statutory definition is certainly a possible one, because the *present tense, passive voice* of the verb "employ" is indeed "employed." Thus a phrase like "organizers employed by the 1996 Republican and Democratic nominees" could refer to political workers engaged at the time the phrase is used in trying to win votes for Senator Dole or President Clinton. But the same phrase is not unambiguously limited to workers presently doing campaign work. Organizers who worked for the same candidates at an earlier point in the 1966 campaign but who quit or were fired before the moment when the phrase is uttered could still be described as "organizers employed by the 1996 Republican and Democratic nominees." That is so because the *past* tense of the verb "employ" — in either the active *or* passive voice — is *also* "employed."[10]

It is precisely for this reason that the term "employed" in the statutory definition is hardly "unambiguous" or "plain." "Employed" may be used in the passive voice to refer to persons presently *or* formerly

[10]Thus, the phrase "organizers employed by the 1996 Republican and Democratic nominees" could also refer to individuals who at some point in the past could correctly have been described as working on behalf of the candidates (past tense, passive voice) *or* to individuals with whom at some point in the past the 1996 nominees had entered into employment relationships (past tense, active voice).

engaged in the employment relationship; or it may be used in the active voice to refer to persons with whom an employment relationship was commenced in the past (whether or not it now continues). If the statutory definition of "employee" contained in 42 U.S.C. § 2000e(f) turns, as the court below correctly held that it does, upon the word "employed," the definitional language is simply inadequate to indicate conclusively the tense or tenses, and voice or voices, in which the word is inflected. But if the term is used in the *past tense, active voice*, and refers to individuals with whom an employment relationship was commenced in the past, it is broad enough to protect petitioner from post-termination retaliation for filing an EEOC charge alleging unlawful termination.

Where two forms of a verb are identical, which meaning is intended may often be clear from the context in which the word appears. Thus, in current usage, "employed by Eastern Airlines" clearly refers to former employees, whereas "employed by the 1996 Olympic Committee" would probably refer to present employees. But section 2000e(f) itself throws no particular light on this issue; the words "by an employer" tell us little, since (more or less by definition) the only entities by whom individuals could be said to be employed (in either voice) are employers.

The opaque language of section 2000e(f) is too slender a reed to support any definitive resolution of the question posed by this case. As this Court observed regarding the similarly phrased definition of "employee" in 29 U.S.C. § 1002(6),[11] "ERISA's nominal definition of 'employee' as 'any individual employed by an employer,'. . . is completely circular and explains nothing." *Nationwide*

[11] "The term 'employee' means any individual employed by an employer."

Mut. Ins. Co. v. Darden, 503 U.S. 318, 323 (1992).

The language in the Title VII definition on which the court below relied, moreover, is also to be found in the definition of employee in the Age Discrimination in Employment Act (ADEA), 29 U.S.C. § 630(f), and the Fair Labor Standards Act (FLSA), 29 U.S.C. § 203(e)(1). A decision for respondent on this basis would require this Court to repudiate portions of *Public Employees Retirement Sys. v. Betts*, 492 U.S. 158 (1989), and to reject the Secretary of Labor's longstanding interpretation of the FLSA. See part III, *infra*.

II. THE TEXT AND PURPOSE OF SECTION TITLE VII AND OF 704(a) IN PARTICULAR DEMONSTRATE THAT "EMPLOYEE," AS USED IN THAT SECTION, ENCOMPASSES FORMER EMPLOYEES.

A. In The Context Of Section 704(a)'s Purpose Of Protecting The Exercise Of Title VII Rights, The Term "Employee" In That Section Must Be Construed To Cover Former Employees Of An Employer In Order To Effectuate Enforcement Of The Statute

The appropriate meaning of the term "employee," or of any statutory language, must be assessed in the context of the provision and statute in which it appears.

> To take a few words from their context and with them thus isolated to attempt to determine their meaning, certainly would not contribute greatly to the discovery of the purpose of the draftsmen of a statute . . .

United States v. American Trucking Ass'ns, 310 U.S. at 542. The text of a statute as a whole indicates "the evils the statute was designed to eradicate." *NLRB v. Hearst Publications*, 322 U.S. at 127. "[T]he history which led to [an] Act and the aims which infuse it give direction to our inquiry." *Phelps Dodge Corp. v. NLRB*, 313 U.S. at 182. The language of each section discloses the manner in which that particular provision was intended to advance the overall statutory purpose.

Title VII was enacted to eradicate the historic and pervasive evil of invidious discrimination in employment. *Albemarle Paper Co. v. Moody*, 422 U.S. 405, 416 (1975). The enforcement of Title VII, like the enforcement of most federal labor laws, is largely dependent on the willingness of aggrieved individuals to bring violations of the law to the attention of federal officials. "The charge process is the lifeblood of Title VII, just as it is under the National Labor Relations Act. . . ." *EEOC v. Virginia Carolina Veneer Corp.*, 495 F. Supp. 775, 777 (W.D. Va. 1980). Under Title VII, as under the NLRA,

> [i]mplementation of the Act is dependent upon the initiative of individual persons who must, as petitioner has done here, invoke its sanctions through filing [a] . . . charge. Congress has made it clear that it wishes *all persons* with information about such practices to be *completely free* from coercion against reporting them. . . .

Nash v. Florida Industrial Comm'n, 389 U.S. at 238 (emphasis added). As is true of the Fair Labor Standards Act,

> [t]he provisions of the statute affect . . . vast numbers of business establishments . . . . For weighty practical and other reasons, Congress did not seek to secure compliance with prescribed standards through continuing

detailed federal supervision . . . .

Mitchell v. DeMario Jewelry, 361 U.S. 288, 292 (1960). Congress understood full well "that fear of economic retaliation might often operate to induce" victims of discrimination to withhold from the EEOC charges of or information about violations of federal law. *Mitchell v. DeMario Jewelry*, 361 U.S. at 292. "[C]omplete freedom is necessary . . . 'to prevent . . . channels of information from being dried up by employer intimidation of prospective claimants and witnesses.'" *NLRB v. Scrivener*, 405 U.S. 117, 122 (1972).

Section 704(a) safeguards the Title VII enforcement mechanisms, as well as less formal efforts to correct violations of the law, by forbidding retaliation against those who have "made a charge, testified, or participated in any manner in an investigation, proceeding or hearing under [Title VII]" or otherwise "opposed any practice made an unlawful employment practice by [Title VII]." 42 U.S.C. § 2000e-3(a). Section 704(a) unquestionably covers the *charge* in this case. Regardless of the meaning of "employee," retaliation against petitioner, on account of that charge, by an employment agency, a joint labor-management committee, or a union of which he was a member, would clearly be illegal, since as to those entities the proscribed retaliation is not limited to employees. In addition, section 704(a) undeniably protects petitioner from certain forms of retaliation, on account of that charge, by respondent. If petitioner were to today apply for any job at Shell, and be rejected because he had earlier filed an EEOC charge, petitioner would be an "applicant" within the protection of the law.[12] The question presented here, then, is whether section 704(a), which forbids respondent from retaliating

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[12]*See, e.g., McDonnell Douglas Corp. v. Green*, 411 U.S. 792 (1973).

against petitioner by refusing to ever hire him again, permits respondent to retaliate against petitioner in other ways. That issue is of pivotal practical importance because in virtually every reported case involving retaliation against a former employee the retaliation was by an employer and took a form other than a refusal to rehire. See pp. 26-27, nn. 16-24, *infra*.

Employer retaliation against former employees, as much as retaliation against current employees, can deter EEOC charges and other protected activities, and thus frustrate enforcement and implementation of Title VII. A charge filed by a former employee with the EEOC plays precisely the same role in that enforcement scheme as a charge filed by a current employee. A charge filed by a then-current employee does not lose its importance under the Act merely because the charging party subsequently ceases to work for the employer in question. An individual with knowledge of an unlawful practice is of the same value to Commission investigators, and his or her testimony is of the same significance at a trial or administrative hearing, without regard to whether he or she still works for the employer at issue. The information which the EEOC and the courts need from current employees is indistinguishable from the information needed from former employees; indeed, it would at times be the identical information needed from the very same (though now no longer employed) persons.

That reprisals by a former employer could deter such individuals from filing charges or providing information or testimony can hardly be disputed. The form of reprisal alleged in this case is providing to a prospective employer false and derogatory references regarding a charging party. Such a reprisal directed at even a current employee—such as a worker seeking a new position because his or her job will soon be eliminated—would of course violate section 704(a). A threat that filing charges or cooperating with the

EEOC will lead to unfavorable references would likely deter from such actions even a current employee with no immediate plans to seek other employment. But the chilling effect on a former employee would obviously be far greater.

> [P]ost-employment blacklisting is sometimes *more* damaging than on-the-job discrimination because an employee subject to discrimination on the job will often continue to receive a paycheck while a former employee subject to retaliation may be prevented from any work in the trade or occupation previously pursued.

Charlton v. Paramus Bd. of Educ., 25 F.3d 194, 200 (3d Cir. 1994)(emphasis added). "[A]n employee who believes he has been wrongly discharged has two choices: (1) he may keep quiet . . . until he finds a new job, or (2) he may file [a] . . . charge . . . and risk financial ruin." *Nash v. Florida Industrial Comm'n*, 389 U.S. at 239. A terminated employee who wishes to file a charge of discrimination should not have to sacrifice his chances of finding new employment in order to pursue his rights under Title VII. "[A] claimant needs work that will feed a family. . . . A job is needed now." *Ford Motor Co. v. EEOC*, 458 U.S. 219, 221 (1982). Yet, under the Fourth Circuit's interpretation, an employer that has fired a worker on the basis of race, national origin or gender could, if section 704(a) does not apply, lawfully "use the fear of restricted job market access to win concessions from [the] former employee." *Atkinson v. Oliver T. Carr Co.*, 40 Fair Empl. Prac. Cas. 1041, 1044 (D.D.C. 1986).

Federal courts have long recognized what every worker knows, that unfavorable job references by a former employer are likely to be fatal to the prospects of a job seeker.

> [I]t is a fact of business life that employers almost invariably require prospective employees to provide the names of their previous employers as references when applying for a job. . . . [Job applicants] could be severely handicapped in their efforts to obtain new jobs if [a prior employer] should brand them as "informers" when references are sought.

Hodgson v. Charles Martin Inspectors of Petroleum, Inc., 459 F.2d 303, 306 (5th Cir. 1972).[13] "A hindrance no less severe and no less offensive ensues from discriminatorily contrived accounts of an applicant's unsuitability for employment." *Shehadeh v. Chesapeake & Potomac Tel. Co.*, 595 F.2d 711, 723 (D.C. Cir. 1978). With lifetime employment with a single company far less common today than a generation ago, favorable job references have assumed for many workers a significance as great as the seniority rights of the past. *Cf. Wygant v. Jackson Bd. of Educ.*, 476 U.S. 267, 283 (1986).

The literature of personnel management is replete with statements pointing out the importance to employers of obtaining job references concerning applicants for employment, such as: "References are a very common way of gathering information about a person's experience and performance on previous jobs."[14] or "It's foolhardy to hire

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[13] *Accord, Rutherford v. American Bank of Commerce*, 565 F.2d at 1166; *Sparrow v. Piedmont Health Systems*, 593 F. Supp. 1107, 118 (W.D. N.C. 1984)("there can be little doubt that the lack of a customary recommendation from a former employer severely disadvantages a person seeking employment"); *Atkinson v. Oliver T. Carr Co.*, 40 Fair Emp. Prac. Cas. at 1043 ("a poor recommendation — or no recommendation at all — could effectively destroy a former employee's chances of future employment.")

[14] LLOYD BAIRD, MANAGING HUMAN RESOURCES 136 (1992).

anyone without checking with the last employer to find out the actual job the applicant held and to verify the dates of employment."[15]

Blacklisting is not the only or necessarily the worst form of reprisal that an employer could inflict on a former employee. Employers might cut off a former employee's severance payments or medical insurance,[16] block disbursement of funds owed to the former employee in an employee benefit plan,[17] seek the revocation of the individual's teaching certificate or other professional license,[18] forbid a nurse to work for any doctor practicing in a hospital,[19] arrange to have the charging party removed from civil service eligibility lists,[20] persuade a subsequent

[15]LESTER R. BITTEL AND JOHN W. NEWSTROM, WHAT EVERY SUPERVISOR SHOULD KNOW 179 (6th ed. 1990). See also CHARLES GARFIELD, SECOND TO NONE, HOW OUR SMARTEST COMPANIES PUT PEOPLE FIRST 244 (1992)("Hiring is a complex process, of which interviewing candidates is only one aspect. . . . Being diligent in your reference checking — these are considerations too . . . ."); LIN GRENSING, A SMALL BUSINESS GUIDE TO EMPLOYEE SELECTION 89 (2d ed. 1991)("Checking the references of the applicants applying for a position is absolutely essential . . . . ")

[16] *EEOC v. Cosmair, Inc. L'Oreal Hair Care Div.*, 821 F.2d 1085, 1087 (5th Cir. 1987).

[17] *EEOC v. J.M. Huber Corp.*, 927 F.2d 1322, 1324 (5th Cir. 1991).

[18] *Charlton v. Paramus Bd. of Educ.*, 25 F.3d at 196.

[19] *Christopher v. Stouder Memorial Hosp.*, 936 F.2d 870, 872-74 (6th Cir. 1991).

[20] *Bailey v. USX Corp.*, 850 F.2d 1506, 1507-08 (11th Cir. 1988).

employer to dismiss the charging party,[21] file a baseless civil suit,[22] orchestrate a groundless arrest and criminal prosecution of a charging party,[23] or even resort to physical violence.[24] An employer free to wield all of these weapons could surely suppress virtually all charges and cut off most potential witnesses from the EEOC.

The viability of the Title VII enforcement mechanisms requires that the anti-retaliation protections of section 704(a) be as broad as the substantive anti-discrimination prohibitions of section 703. But exclusion of former employees from section 704(a) would place largely outside the protections of that provision testimony and other actions opposing major categories of discrimination forbidden by section 703. Victims of unlawful discriminatory dismissal will by definition be former employees immediately after that type of violation occurs. If section 704(a) is to

[21] *Sherman v. Burke Contracting, Inc.*, 891 F.2d 1527, 1529 (11th Cir. 1990); *Caudill v. Farmland Indus., Inc.*, 919 F.2d 83, 86 (8th Cir. 1990).

[22] *EEOC v. Levi Strauss & Co.*, 515 F. Supp. 640 (N.D. Ill. 1981); *EEOC v. Virginia Carolina Veneer Corp.*, 495 F. Supp. 775, 777 (W.D. Va. 1980); *Buzogany v. Roller Bearing Co.*, 47 Fair Emp. Prac. Cas. 1485, 1486 (D.N.J. 1988).

[23] *Berry v. Stevinson Chevrolet*, 804 F. Supp. 121, 128-31 (D. Colo. 1992); *Beckham v. Grand Affair of N.C.*, 671 F. Supp. 415, 419-20 (W.D. N.C. 1987); *Atkinson v. Oliver T. Carr Co.*, 40 Fair Emp. Prac. Cas. at 1043.

[24] *Reed v. Shepard*, 939 F.2d 484, 492 (7th Cir. 1991)(allegations that retaliation included late-night threatening phone calls, physical attack by a disguised assailant, and shooting at charging party's car); *Commonwealth of Pa. v. Local 542, International Union of Operating Engineers*, 347 F. Supp. 268, 274-75 (E.D. Pa. 1972)(charging parties attacked with razor and chair).

protect at all victims of such discharges, it ordinarily can do so *only* by applying to former employees.[25] The same, of course, is true of victims of discrimination in the payment of retirement benefits. *See Arizona Governing Committee v. Norris*, 463 U.S. 1073 (1983); *Los Angeles Dept. of Water & Power v. Manhart*, 435 U.S. 702 (1978). Although section 703 of Title VII undeniably forbids discrimination in discharges and pension benefits, if employers could legally and openly retaliate against anyone who filed a charge asserting such discrimination, those prohibitions in section 703 could well be rendered unenforceable. Section 704(a) should not be construed in a manner likely to effectively nullify specific substantive prohibitions of section 703. *See NLRB v. Town & Country Elec., Inc.*, ___ U.S. ___, 116 S. Ct. 450 (1995).

If former employees were outside the scope of section 704(a), an employer could openly announce to current employees, for example, that it had a policy of giving unflattering recommendations to any former worker who had ever filed a Title VII charge. Such a practice, although inflicted only on former employees, would operate to deter

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[25] Victims of discriminatory discharge almost invariably only file with the EEOC after they have left work. See, e.g., *Gilmer v. Interstate/Johnson Lane Corp.*, 500 U.S. 20 (1991); *EEOC v. Commercial Office Prods. Co.*, 486 U.S. 107 (1988); *Meritor Savs. Bank, FSB v. Vinson*, 477 U.S. 57 (1986); *Kremer v. Chemical Constr. Corp.*, 456 U.S. 461 (1982); *Delaware State College v. Ricks*, 449 U.S. 250 (1980); *Mohasco Corp. v. Silver*, 447 U.S. 807 (1980); *Great Am. Fed. Savs. & Loan Ass'n v. Novotny*, 442 U.S. 366 (1979); *United Airlines, Inc. v. McDonald*, 432 U.S. 385 (1977); *International Union of Elec., Radio & Mach. Workers, AFL-CIO, Local 790 v. Robbins & Myers, Inc.*, 429 U.S. 229 (1976); *Johnson v. Railway Express Agency, Inc.*, 421 U.S. 454 (1975); *Alexander v. Gardner-Denver Co.*, 415 U.S. 36 (1974).

current employees from filing charges or cooperating with the EEOC. Indeed, coercing current employees would often be one of the central purposes of such mistreatment of former employees. A state could refuse to provide unemployment compensation to dismissed employees whose discharge was the subject of an EEOC charge. *Cf. Nash v. Florida Industrial Comm'n*. An employer could arbitrarily slash pensions for all female retirees by 50%, and then send to each a notice that it would permanently and completely end the pension of any woman who complained or talked to the EEOC. *Cf. Arizona Governing Committee v. Norris*. An employer could put all former employees "on notice" that it would cut their pensions and file libel actions against any of them who testified in support of any discrimination claim. *See Bill Johnson's Restaurants, Inc. v. NLRB*, 461 U.S. 731, 740 (1983). "Congress surely did not intend . . . to insulate such blatantly discriminatory practices from judicial redress under Title VII." *County of Washington v. Gunther*, 452 U.S. 161, 179 (1981). Such a construction of section 704(a) "would sanction a most effective way of defeating" enforcement of section 703. *Phelps Dodge Corp. v. NLRB*, 313 U.S. at 193.

The Fourth Circuit's interpretation of section 704(a) creates a number of perverse incentives. As Judge Hall correctly observed in his dissenting opinion, an employer that intends to discriminate against an employee would be well advised to fire the employee, since a dismissed employee—unlike a demoted, transferred, or underpaid employee—could be openly intimidated from filing charges through threats of retaliatory action. Pet. App. A-23, n. 4. An employer that had reason to think it might be charged with retaliation against a former employee would be strongly discouraged from rehiring the dismissed worker, even in a lower position, because doing so would render unlawful any ongoing retaliatory actions. *Cf. Ford Motor Co. v. EEOC*, 458

U.S. at 229. Thus, in the instant case, on the Fourth Circuit's view, respondent's allegedly retaliatory denial of a reference would become actionable if respondent permitted petitioner, while seeking other employment, to obtain a temporary job pumping gas at any of the 4000 service stations operated by Shell in the United States.

Retaliation would in some instances become an affirmative defense. An employer charged with having discriminated against a former employee on the basis of race—such as by denying retirement or severance benefits—could win exoneration by proving that it did so, not because the former employee was black, but in order to punish the former employee for having once provided information to the EEOC. And an employer which wished to retaliate against a current employee for filing a charge or testifying could do so legally by waiting until the individual retired or went to work for another employer, and would be at liberty to announce its intentions in advance to that employee. Congress surely did not intend to thus "invite adroit schemes" to undermine enforcement of Title VII. *United States v. Silk*, 331 U.S. 704, 712 (1947). Not even unambiguous statutory language—which is surely lacking here—would lead this Court to such "absurd or futile results." *United States v. American Trucking Ass'ns*, 310 U.S. at 543.

B. Interpreting § 704(a) To Deny Former Employees Protection From Retaliation By Their Former Employers Would Eviscerate Other Statutory Protections Affecting Post-Termination Aspects of the Employment Relationship.

The Fourth Circuit grounded its decision in part on the assertion that section 703 forbids only "discrimination with respect to certain aspects of employment, and does not

redress discriminatory practices *after* the employment relationship has terminated." Pet. App. A-14 to A-15(emphasis added). However, in *Hishon v. King & Spalding*, 467 U.S. 69 (1984), this Court expressly held that section 703 forbids discrimination in the dispensing of any benefits of employment *after* as well as during the employment relationship:

> The benefit a plaintiff is denied need not *be* employment to fall within Title VII's protection; it need only be a term, condition, or privilege *of* employment. . . . A benefit need not accrue before a person's employment is completed to be a term, condition, or privilege of that employment relationship.

467 U.S. at 77 (emphasis in the original). In the instant case, the petitioner was discriminated against in the provision of a job reference. Although Title VII does not require former employers to provide reference letters, many employers do so, treating favorable recommendations as one of the benefits provided to workers in return for competent and loyal service. In such a situation section 703 forbids an employer to refuse to provide such letters to former employees because of their race, national origin, religion or gender. It would be bizarre if section 704(a) permitted an employer to refuse to provide such letters to a former employee in retaliation for filing a discrimination charge, *e.g.*, a charge that the employer only provided recommendations for white former employees.

The Fourth Circuit's assertion that "Title VII's anti-retaliation provision does not redress post-employment retaliation," (Pet. App. A-14) is flatly inconsistent with the language of section 704(a). As we noted *supra*, section 704(a) unequivocally *does* protect former employees after the end of the employment relationship from retaliation by an

employment agency, a joint labor-management committee, or a union, and from a retaliatory refusal of his or her former employer to rehire the former employee. In practice, however, these protections are of little significance, because virtually every reported case of retaliation against a former employee involves actions taken by a former employer against a worker seeking a job at some other firm.

In some cases if a plaintiff could prove that the dismissal which triggered his charge, and which led in turn to the retaliation which followed, was in fact racially motivated, an equitable remedy for the unlawful discharge might well eliminate the effects of that retaliation in order to put the plaintiff in the "position where [he] would have been in were it not for the unlawful discrimination." *Albemarle Paper Co. v. Moody*, 422 U.S. at 421. But Congress cannot have intended such an erratic and unpredictable degree of protection for former employees. "[S]tatutory protection should not turn on . . . events that have no relation to the need for protection. . . . This would be unequal and inconsistent protection and is not the protection needed to preserve the integrity of the . . . process in its entirety." *NLRB v. Scrivener*, 405 U.S. at 124.

An employer may provide individuals with benefits that are part and parcel of the employment relationship even in the absence of an employment relationship. *Hishon v. King & Spalding*, 467 U.S. at 75. "Such a benefit, though not a contractual right of employment, may qualify as a 'privilege' of employment under Title VII." *Id.* As such it "may not be doled out in a discriminatory fashion." *Id.* Title VII protects any individual from discrimination that adversely affects a term, condition or privilege of employment or "incident of employment," even after the employment relationship has ended. *Id.* at 75.

A reference from a former employer to a prospective employer is a common "term, condition or privilege of employment." Just as an employer contemplating hiring an applicant generally checks the applicant's references, employers expect to be asked for references by prospective employers of their former employees. Requests for references on one's former employees is a routine part of business. From the employee's perspective, it is a natural expectation that after the employment ends and he or she seeks new employment, that person's former employer will give the prospective employer a report on the person's qualifications. A reference from one's former employer is one of the "incidents" or "benefits" of employment that form "an aspect of the relationship between the employer and employees," making it a "term, condition, or privilege of employment." It is, of course, clear that "those benefits that comprise the incidents of employment . . . or that form an aspect of the relationship between the employer and employees may not be afforded in a manner contrary to Title VII." *Hishon*, 467 U.S. at 75. Consequently, since a claim of discrimination in regard to a post-employment job reference would be cognizable under the substantive prohibitions of Title VII, a claim of retaliation for making such a claim must be cognizable under section 704(a).

Application of section 704(a) to any retaliation by an employer against a former employee is consistent with the EEOC's longstanding interpretation of that provision. The Commission's regulation regarding employment discrimination claims against the federal government is phrased in broad language that recognizes no exception for former employees:

> No *person* shall be subject to retaliation for opposing any practice made unlawful by title VII of the Civil Rights Act . . . or for participating in any stage of administrative or

judicial proceedings under those statutes.

29 C.F.R. § 1614.101(b)(1992)(emphasis added). The EEOC Compliance Manual interprets section 704(a) to apply to post-employment retaliation. "A respondent employer's obligation to refrain from retaliation against a former employee who has opposed discrimination does not end once that employee leaves its employ." *EEOC Compliance Manual*, § 614.7(f).

Such a broad interpretation of section 704(a) is supported as well by the legislative history of Title VII. The House Labor Committee report on what later became section 704(a) explained that the anti-retaliation provision

> makes it an unlawful employment practice for an employer, employment agency, or labor organization to discriminate in any manner against *another person* because he has opposed any practice made an unlawful employment practice by other sections of the act or because he has made a charge, testified, assisted, or participated in any manner in the enforcement of the act.

H.R. REP. NO. 1370, 87th Cong. 2d Sess., at 11 (1962)(emphasis added). The Interpretive Memorandum of Senators Clark and Case summarizing the final compromise bill explained the meaning of the anti-retaliation section, then numbered section 705(a), as follows:

> . . . Section 705(a) prohibits discrimination by an employer or labor organization against *persons* for opposing discriminatory practices, and for bringing charges before the commission or otherwise participating in proceedings under the title.

110 Cong. Rec. 7213 (emphasis added).

* * * * * * *

In sum, retaliation by an employer against a former employee interferes with enforcement of section 704(a) in precisely the same way as the instances of retaliation that are undeniably covered by that section. In many instances retaliation against former employees will have the effect, and indeed the very purpose, of deterring current employees from filing charges or testifying in order to effectuate other substantive rights protected by Title VII. It is quite implausible that Congress, by using the word "employee"—a term utilized elsewhere in Title VII to include former employees—meant to create a gaping hole in the protections of section 704(a) and in the overall statutory enforcement scheme. When Congress created exemptions from the general scheme in Title VII, it did so expressly and with specificity. *Hishon v. King & Spalding*, 467 U.S. at 78 n.11. The exemptions accorded by Title VII to certain practices or situations are either set out in the explicit section 702 exemptions, or are expressly signaled by prefatory language such as "notwithstanding any other provision of this subchapter,"[26] "notwithstanding any other provision of this subchapter"[27] "nothing contained in this subchapter,"[28] or "except."[29] In the absence of any such express indication of any intent to create an exemption, the use of the word "employee" should not be read to create the loophole proposed by the court below.

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[26] 42 U.S.C. §§ 2000e-2(e), 2000e-2(g), 2000e-2(h).

[27] 42 U.S.C. § 2000e-2(k)(3).

[28] 42 U.S.C. §§ 2000e-2(i), 2000e-2(j).

[29] 42 U.S.C. § 2000e-3(b).

III. THE ANTI-RETALIATION PROVISIONS OF FEDERAL LABOR LAW HAVE TRADITIONALLY BEEN LIBERALLY CONSTRUED

For as long as federal law has regulated relations between labor and management, specific provision has been made to protect workers who seek to enforce federal rights, or who provide information or testimony to federal enforcement agencies. To ensure the vindication of worker rights established by the National Industrial Recovery Act, President Roosevelt issued Executive Order 6711, which prohibited certain forms of retaliation against workers "for making a complaint or giving evidence with respect to an alleged violation."[30] Today anti-retaliation provisions protecting "employees" are contained in nine major federal labor laws: the National Labor Relations Act,[31] Fair Labor Standards Act,[32] Occupational Safety and Health Act,[33] Federal Labor-Management and Employee Relations Act,[34] Migrant and Seasonal Agricultural Worker Protection Act,[35] Longshore and Harbor Workers' Compensation Act,[36] Employee Polygraph Protection Act,[37] Age

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[30]Quoted in *NLRB v. Scrivener*, 405 U.S. at 123.

[31] 29 U.S.C. § 158(a)(4).

[32] 29 U.S.C. § 215(a)(3).

[33] 29 U.S.C. § 660(c)(1).

[34] 5 U.S.C. § 7116(a)(4).

[35] 29 U.S.C. § 1855(a).

[36] 33 U.S.C. § 948a.

[37] 29 U.S.C. § 2002(4).

Discrimination in Employment Act,[38] and Title VII of the 1964 Civil Rights Act.[39]

The 1934 Executive Order was framed in a way that could only have applied to an individual who was actually working for the employer in question at the time of the retaliatory action; the sole retaliatory acts forbidden were to "dismiss or demote" the victim.[40] But all the legislation which followed has utilized the far more general term "discriminate" to denote the forbidden conduct. This Court noted in *NLRB v. Scrivener*, 405 U.S. at 122, that this language reflected "an intent on the part of Congress to afford broad rather than narrow protection," because "complete freedom is necessary . . . 'to prevent the Board's channels of information from being dried up by employer intimidation of prospective complainants and witnesses.'" *Id.* (*quoting John Hancock Mut. Life Ins. Co. v. NLRB*, 191 F.2d 483, 485 (D.C. Cir. 1951)).[41] Unlike the original executive order, the touchstone of these statutory prohibitions is not whether certain specified methods were used by the employer, but whether the employer acted with the forbidden retaliatory motive.

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[38] 29 U.S.C. § 623(d).

[39] 42 U.S.C. § 2000e-3(a).

[40]*NLRB v. Scrivener*, 405 U.S. at 123.

[41] Significantly, *John Hancock* was a case in which the NLRA's anti-retaliation provision was applied to an individual who was *not* working for the employer in question at the time of the retaliatory incident. The court of appeals in that case concluded that section 8(a)(4) of the NLRA nonetheless applied because the term "employee" under the NLRA denoted "in a generic sense, members of the working class." 191 F.2d at 485.

This Court has "liberally construed" such anti-retaliation provisions to assure that victims of discrimination or witnesses to such violations may file charges, testify, assist in investigations, or otherwise oppose violations of federal labor law, "without fear of restraint, coercion, discrimination or interference." *Bill Johnson's Restaurants, Inc. v. NLRB*, 461 U.S. at 740. Although this Court has not heretofore had occasion to consider the scope of Title VII's anti-retaliation provision, the Court has in a number of instances been called upon to apply the similar provisions of other federal laws. The Court has twice applied the anti-retaliation section of the NLRA to acts of alleged retaliation which were inflicted on individuals only after they had ceased working for the employers in question. *Nash v. Florida Industrial Commission*; *Bill Johnson's Restaurants, Inc. v. NLRB*. The Court has also held that the ADEA prohibits the framing of pension schemes for the purpose of retaliating against individuals who had engaged in protected conduct. *Public Employees Retirement System v. Betts*. These decisions, although not necessarily conclusive of the instant litigation, are persuasive precedent for applying Title VII as well to former employees.[42]

In *Nash v. Florida Industrial Commission*, the petitioner, having been laid off on May 16, 1965, subsequently filed on June 17, 1965, a charge with the

[42]This Court has recognized on a number of occasions that Congress used the National Labor Relations Act as a model for portions of Title VII. *See, e.g., Albemarle Paper Co. v. Moody*, 422 U.S. at 419; *Franks v. Bowman Trnsp. Co.*, 424 U.S. 747, 768-70 (1976); *International Bhd. of Teamsters v. United States*, 431 U.S. 324, 366 (1977); *Ford Motor Co. v. Equal Employment Opportunity Comm'n*, 458 U.S. 219, 232 (1982)(citing *Phelps Dodge Corp. v. NLRB*, 313 U.S. 177, 197-98 (1941)); *Zipes v. Trans World Airlines*, 455 U.S. 385, 395, n.11 (1982); *Hishon v. King & Spalding*, 467 U.S. at 76, n.8; *Lorance v. AT&T Technologies*, 490 U.S. 900, 909 (1989).

NLRB that her layoff was the result of union activities.[43] When petitioner sought unemployment compensation from the state, her claim was denied for the period following June 17, pursuant to a state law which barred such compensation if the unemployment resulted from a dismissal that was the subject of an unfair labor practice charge. This Court held that the legality of such a state rule was to be measured against the standard of the anti-retaliation provision contained in section 8(a)(4) of the NLRA. 389 U.S. at 239. Although section 8(a)(4), like section 704(a) of Title VII, applies only to "employees," the Court had no doubt that Mrs. Nash, even after she had lost her job, was still protected by section 8(a)(4)'s prohibition against discrimination "against an *employee* because he has filed charges." 389 U.S. at 238 (emphasis added). The Court reasoned that coercive measures would be particularly harmful to a petitioner such as Nash precisely *because* she was no longer working for her former employer and was therefore "faced with the immediate severance of sustaining funds." 389 U.S. at 239.

A related situation was presented in *Bill Johnson's Restaurants, Inc. v. NLRB*. Following the dismissal of one Myrland Helton, Helton filed an unfair labor charge with the NLRA, and subsequently she, several former restaurant employees and certain striking employees commenced picketing the restaurant. The employer then sued Helton, the other former employees and the striking employees in state court, alleging, *inter alia*, that they had harassed

[43] That charge remained unresolved when the case was before this Court. Brief for Respondents, No. 48, Oct. Term 1967, p. 2.

customers and libeled the employer.[44] In response the General Counsel of the NLRB issued a new complaint under section 8(a)(4), asserting that Bill Johnson's had commenced that suit to retaliate against Helton and the others because they had filed charges under the NLRA and had engaged in protected concerted activities. 461 U.S. at 735. This Court held that such a suit, if commenced with a retaliatory motive, could well violate section 8(a)(4):

> [B]y suing an employee who files charges with the Board . . . , an employer can place its employees on notice that anyone who engages in such conduct is subjecting himself to the possibility of a burdensome lawsuit. Regardless of how unmeritorious the employer's suit is, the employee will most likely have to retain counsel and incur substantial legal expenses to defend against it. . . . [T]he chilling effect of a state lawsuit . . . is multiplied where the complaint seeks damages in addition to injunctive relief.

461 U.S. at 740-41. This Court remanded the case to the NLRB to consider whether the lawsuit in that case lacked a reasonable basis in fact. 461 U.S. at 749. That remand would have made little sense if section 8(a)(4) were limited to current employees. Were that the case, the charges on behalf of the former employees should have been dismissed.[45] Although *Nash* and *Bill Johnson's* were

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[44] *Bill Johnson's Restaurants, Inc. v. NLRB*, 249 NLRB 155, 157, 162 n.20 (1980), *enforced*, 660 F2d. 1335 (9th Cir. 1981), *vacated and remanded*, 461 U.S. 731 (1983).

[45] The NLRB had also forbidden the employer from retaliating against former employees by means of abusive depositions. 249 NLRB at 165-68, 170.

decided after the adoption of Title VII, even before the enactment of the 1964 Civil Rights Act it was well established that the protections accorded to "employees" by section 8(a)(4) of the NLRA extended to individuals who had been dismissed by an employer.[46]

In *Public Employees Retirement Sys. v. Betts*, 492 U.S. 158 (1989), the Court considered the application to retired workers of the anti-retaliation provisions of the Age Discrimination in Employment Act.[47] Although noting that pension plans are to some degree accorded special treatment under section 4(a) of the ADEA, the Court admonished:

> Under § 4(d) of the ADEA . . . it is unlawful for an employer to discriminate against an employee who has "opposed any action made unlawful by" the Act or has participated in the filing of any age-discrimination complaints or litigation. Nothing in § 4(f)(2) would insulate from liability an employer who adopted a plan provision formulated to retaliate against such an employee. See 29 CFR § 1625.10(d)(5) (1988).

492 U.S. at 180. Section 4(d), like section 704(a) of Title VII, forbids retaliation against an "employee." As a practical matter, of course, most if not all applications of a retaliatory *pension* plan would be to retirees; *Betts'* assertion that

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[46] *E.g., John Hancock Mut. Life Ins. Co. v. NLRB*, 191 F.2d at 485 ("employees" protected by section 8(a)(4) include "not only the existing employees of an employer but also, in a generic sense, members of the working class.").

[47] The plaintiff in that case had retired in 1985, and subsequently brought suit alleging that the state method of calculating her retirement benefits violated the ADEA.

section 4(d) of the ADEA applies to retaliatory pension schemes would be meaningless unless, as the Court clearly assumed, that anti-retaliation provision applies to and protects retirees. In the regulation cited by the Court in *Betts*, the EEOC has authoritatively construed section 4(d) of the ADEA in a manner which clearly rejects any distinctions between current and former workers.[48] Consistent with this language in *Betts* and that regulation, the EEOC has maintained in litigation and the lower courts have consistently held that section 4(d) applies to former employees.[49]

In litigation under the Fair Labor Standards Act, the Secretary of Labor has repeatedly maintained that former employees should be accorded the same protections as current employees, not only with regard to that statute's anti-retaliation provision but also as to the judicially fashioned "informer's privilege," which permits the Secretary, in order to avoid possible retaliation, to refuse to disclose to an employer the names of individuals who have made statements to government investigators.[50] Although section

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[48] The regulation interprets the anti-retaliation provisions of the ADEA to provide "that it is unlawful for an employer, employment agency, or labor organization to discriminate against *any individual* because such individual 'has made a charge, testified, assisted, or participated in any manner in an investigation, proceeding, or litigation under this Act" (emphasis added).

[49] *EEOC v. Cosmair, Inc., L'Oreal Hair Care Div.*, 821 F.2d at 1088-89; *Passer v. American Chem. Soc'y*, 935 F.2d at 331; *Cohen v. S.U.P.A., Inc.*, 814 F. Supp. 251, 259-60 (N.D.N.Y. 1993); *Buzogany v. Roller Bearing Co.*, 47 Fair Emp. Prac. Cas. at 1486.

[50] *Dunlop v. Carriage Carpet Co.*, 548 F.2d 139 (6th Cir. 1977); *Hodgson v. Charles Martin Inspectors of Petroleum, Inc.*, 459 F.2d at 305-06.

15(a)(3) of the FLSA literally protects only an "employee" from retaliation, the lower courts have applied it to former employees, relying on the same NLRA cases cited by this Court in *Nash*.[51] A contrary construction of § 704(a) would be inconsistent with this settled precedent in other statutory contexts and would produce a body of law that is incoherent and ineffective, contrary to the intentions of Congress.

CONCLUSION

The lower court erred in holding that section 704(a) of Title VII is not applicable to the petitioner's claim. The text and purpose of section 704(a) show that the term "employee" therein encompasses former employees. The Court should reverse the Fourth Circuit's judgment and remand this case for further proceedings.

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[51] *Dunlop v. Carriage Carpet Co.*, 548 F.2d at 146 (*citing John Hancock Mut. Life Ins. Co. v. NLRB,, NLRB v. Syracuse Stamping Co.*, 208 F.2d 77 (2nd Cir. 1953) and *NLRB v. Lamar Creamery Co.*, 246 F.2d 8 (5th Cir. 1957).

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IN THE
Supreme Court of the United States
OCTOBER TERM, 1996

CHARLES T. ROBINSON,
Petitioner,
v.
SHELL OIL COMPANY,
Respondent.

On Writ of Certiorari to the
United States Court of Appeals
for the Fourth Circuit

BRIEF FOR RESPONDENT

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QUESTIONS PRESENTED FOR REVIEW

Does Title VII § 704(a) of the Civil Rights Act of 1964 give former employees a cause of action for acts of retaliation allegedly occurring after the employment relationship has ended?

PARTIES TO THE PROCEEDING

1. Charles T. Robinson, Sr. (hereinafter referred to as "Robinson"), Plaintiff in the District Court and Petitioner.

2. Shell Oil Company[1] (hereinafter referred to as "Shell"), Defendant in the District Court and Respondent (hereinafter referred to as "Shell").

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[1] Shell Oil Company is wholly owned by Shell Petroleum Inc. Shell Petroleum Inc. is directly or indirectly owned 60% by Royal Dutch Petroleum Company and 40% by the "Shell" Transport and Trading Company, p.l.c., which are publicly traded companies. Shell Oil Company has no subsidiaries which are less than wholly owned.

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INTRODUCTION

This case involves the proper interpretation of a federal statute. Title VII § 704(a) of the Civil Rights Act of 1964,[2] declares it to be an unlawful employment practice for an employer to discriminate against "any of his employees or applicants for employment" because he has made a charge under Title VII. Does a person who is not an "employee or applicant for employment" have a cause of action under this statute against his former employer?

This case was filed in the United States District Court for the District of Maryland on January 4, 1993.[3] The District Court, Chief District Judge J. Frederick Motz presiding, granted a Motion to Dismiss on April 8, 1993, and entered an order dismissing the case. Robinson filed a Notice of Appeal on May 6, 1993.

On January 18, 1995, a panel of the United States Court of Appeals for the Fourth Circuit issued an Opinion reversing the judgment of the District Court and remanding the case for further proceedings.

On March 1, 1995, the Fourth Circuit granted Shell's Petition for Rehearing En Banc. On November 29, 1995, the Fourth Circuit issued an En Banc Opinion affirming the dismissal by the District Court.

Robinson filed a Petition for Writ of Certiorari on February 27, 1996. The Petition was granted on April 22, 1996, and Robinson filed the Brief for the Petitioner on June 21, 1996.

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2 42 U.S.C. § 2000e-3(a).

3 The Complaint listed three individuals in addition to Shell as Defendants. Robinson did not appeal the dismissal as to these individuals and they are no longer in this case.

In the Brief for Petitioner, Robinson argues that the term "employees" as used in § 704(a) is ambiguous and should be interpreted liberally to include former employees. The term "employee" is not ambiguous. The statute should not be given a strained construction to include former employees.

CITATION OF OPINIONS

The Opinion of the United States Court of Appeals for the Fourth Circuit, sitting En Banc, issued on November 29, 1995, affirming the judgment in favor of Shell, is published at 70 F.3d 325.

The earlier Opinion of the panel of the United States Court of Appeals for the Fourth Circuit, issued on January 18, 1995, reversing the judgment in favor of Shell and remanding the case, is unpublished. A copy is reprinted in the Appendix to the Petition for Writ of Certiorari.

The Opinion of the United States District Court for the District of Maryland, issued on April 8, 1993, is unpublished. A copy is reprinted in the Appendix to the Petition for Writ of Certiorari.

JURISDICTIONAL STATEMENT

The Supreme Court has jurisdiction to review this case under 28 U.S.C. § 1254(1). The opinion of the Fourth Circuit issued on November 29, 1995. The Petitioner timely filed a Petition for Writ of Certiorari on February 27, 1996.

APPLICABLE STATUTE

This case involves the proper interpretation of a federal statute, Section 704(a) of the Civil Rights Act of 1964:

> It shall be an unlawful employment practice for an employer to discriminate against any of his employees or applicants for employment, for an employment agency, or joint labor-management committee controlling apprentice-ship or other training or retraining, including on-the-job training programs, to discriminate against any individual, or for a labor organization to discriminate against any member thereof or applicant for membership, because he has opposed any practice made an unlawful employment practice by this subchapter, or because he has made a charge, testified, assisted, or participated in any manner in an investigation, proceeding, or hearing under this subchapter.

STATEMENT OF THE CASE

A. THE CHARGE OF DISCRIMINATION

Robinson is a former Territory Sales Representative in Shell's Mid Atlantic Retail Marketing District. His employment was terminated effective October 13, 1991 under a severance program. Following termination of his employment, Robinson filed a charge of discrimination with the Equal Employment Opportunity Commission (hereinafter referred to as the "E.E.O.C."). Robinson alleged that he had been fired on the basis of his race (Black).

The charge of discrimination resulted in a lawsuit, *Robinson v. Shell Oil Company*, Civil Action No. JFM 93-29 in the United States District Court for the District of Maryland. The suit was tried before the court, Chief District Judge J. Frederick Motz presiding, in April, 1994. At the conclusion of the trial, Judge Motz entered a judgment in favor of Shell. There was no race discrimination. Robinson did not appeal that judgment.

B. THE CHARGE OF RETALIATION

In February 1992, four months after he had been severed from Shell, Robinson applied for a job as an Insurance Account Representative with Metropolitan Life Insurance Company. On February 28, 1992, Metropolitan Life wrote a letter to Shell requesting information regarding Robinson's prior employment.

The form letter requested Robinson's period of employment, job position, job description, and weekly salary. The form also asked Shell to rate Robinson's attendance as "perfect, excellent, average, or poor." Shell was also asked whether Robinson left employment voluntarily

and whether it would rehire him. Finally, Shell was asked to rate Robinson in ten categories as "above average, average, or below average."

Ross Fava, Sales Manager for Shell, completed the form on March 2, 1992, stating Robinson did not leave the employment voluntarily but was terminated on October 13, 1991. He also rated Robinson's attendance as "poor" and stated that Shell would not rehire him. Finally, Fava rated Robinson as "below average" in nine of the ten categories.

On March 10, 1992, Robinson filed a second charge with the E.E.O.C. This time Robinson asserted that Shell had given him a poor employment reference because he had previously filed a charge of discrimination against Shell. In sum, Robinson alleged that Shell had retaliated against him for filing his charge of discrimination in violation of the anti-retaliation provision of the Civil Rights Act of 1964, Title VII § 704(a).

The charge of retaliation resulted in the present lawsuit.

1. PROCEEDINGS BEFORE THE DISTRICT COURT

On January 4, 1993, Robinson filed this suit in the United States District Court for the District of Maryland. This case was also assigned to Chief District Judge Motz. Robinson claimed that Shell had retaliated against him by "providing false information and negative job references to perspective (sic) employers."

On March 23, 1993, Shell filed a Motion to Dismiss in accordance with Rule 12(b)(6) of the Federal Rules of Civil Procedure. Shell posited that Robinson was not

employed by Shell at the time the employment reference was made and, therefore, § 704(a) did not apply.

Shell relied upon the case of *Polsby v. Chase*, 970 F.2d 1360 (4th Cir. 1992), *vacated sub nom. Polsby v. Shalala*, 507 U.S. 1048, in filing its motion to dismiss. The Fourth Circuit opinion in *Polsby*, issued on August 12, 1992, held that the plain wording of § 704(a) applied to "employees or applicants for employment," and not to former employees.

On April 8, 1993, in reliance on *Polsby*, Chief District Judge Motz granted Shell's Motion to Dismiss and entered an order dismissing the case.

On April 26, 1993, the Supreme Court vacated the Fourth Circuit's judgment in *Polsby* and remanded the case "for further consideration in light of the position asserted by the Acting Solicitor General in his brief for the United States filed March 5, 1993." The Court did not address the merits of the Fourth Circuit opinion.

On May 6, 1993, Robinson filed a Notice of Appeal to the United States Court of Appeals for the Fourth Circuit.

2. PROCEEDINGS BEFORE A PANEL OF THE FOURTH CIRCUIT

Robinson's appeal was argued before a panel comprised of Circuit Judges Hall, Hamilton, and Michael of the Fourth Circuit on September 28, 1994. On January 18, 1995, Judge Hall, writing for the majority of the panel, reversed the judgment of the District Court and remanded the case for further proceedings. Judge Hamilton filed a dissent.

On January 30, 1995, Shell filed a Petition for Rehearing and Suggestion for Rehearing En Banc. On March 1, 1995, the Fourth Circuit vacated the panel decision and granted rehearing en banc.

3. PROCEEDINGS BEFORE THE FOURTH CIRCUIT EN BANC

The appeal was reargued before the Fourth Circuit sitting en banc on September 26, 1995. On November 29, 1995, Judge Hamilton, writing for the majority of the Court, affirmed the judgment of the District Court. Judge Hall filed a dissent, as did Judge Murnaghan.

4. PROCEEDINGS BEFORE THE SUPREME COURT

On February 27, 1996, Robinson filed a Petition for Writ of Certiorari with this Court. The petition was granted on April 22, 1996.

SUMMARY OF THE ARGUMENT

Under the normal rules of statutory construction this case should be affirmed. The language of § 704(a) is clear and unambiguous. Employers are prohibited from retaliating against "his employees and applicants for employment." Former employees are not included within the protection of § 704(a).

Robinson realizes that the plain wording of the statute excludes former employees. Therefore he attempts to convince the Court that the word "employee" is ambiguous by pointing to the use of the word in other statutes and supposed inconsistencies within Title VII. These arguments are futile. "Employee" must be understood within the context of Title VII. Title VII consistently uses "employee" to refer to current employees.

Robinson hopes to build on the supposed ambiguity of "employee" to convince the Court that the text and purpose of Title VII demand that "employee" be read to mean current and former employees. Robinson is wrong. The exclusion of former employees from § 704(a) does not conflict with the text or purpose of Title VII.

Congress used different language to describe retaliation and discrimination. There are legitimate reasons for offering more protection against discrimination than retaliation. Former employees are adequately protected from retaliation by former employers under federal and state statutes as well as common law causes of action. Therefore, Congress chose to provide a cause of action for retaliation for former employees, as "applicants for employment," only against prospective employers. Additionally, the original remedies section and the short limitations period within Title VII indicate an intention by Congress to limit claims of

retaliation to acts occurring during employment.

Rewriting § 704(a) to protect former employees from retaliation by their former employers would conflict with recent state legislation protecting employment references. It would also conflict with the established common law cause of action for defamation. Disgruntled former employees could sue former employers over employment references even if the references are true and the employer has complied with state law.

This will lead to absurd results, such as this case. Shell has already proven, in the first suit filed by Robinson, that the statements in the employment reference were true and that Shell had good reason for firing Robinson. Now Robinson wants to stop Shell from responding to a request for information by criticizing his past performance. Should a former employee be protected from a truthful employment reference?

ARGUMENT

Does Title VII § 704(a) of the Civil Rights Act of 1964 give former employees a cause of action for acts of retaliation allegedly occurring after the employment relationship has ended?

A. This case should be decided under the normal rules of statutory construction.

Any case involving the proper interpretation of a statute must begin by examining the statutory language. Words therein should be interpreted according to their common usage. Courts are not free to read into a law what is not there. *K-Mart Corporation v. Cartier, Inc.*, 486 U.S. 281, 291 (1988).

If a statute contains both specific and general provisions, it is a commonplace of statutory construction that the specific governs the general. *Morales v. Trans World Airlines, Inc.*, 504 U.S. 374, 384 (1992).

If the statutory language is unambiguous and the statutory scheme is coherent and consistent, interpretation is unnecessary. The sole function of the court is to enforce the statute according to its terms. *United States v. Ron Pair Enterprises, Inc.*, 489 U.S. 235, 240-41 (1989); *Caminetti v. United States*, 242 U.S. 470, 485 (1917).

There are only two exceptions when a court may stray from the plain language of an unambiguous statute. The first is when literal application of the statute would lead to an absurd result. This exception applies only under rare and exceptional circumstances. The absurdity must be so gross as to shock the general moral or common sense and there must be something to make plain Congress' intent that the

apparent letter of the law cannot prevail. *Crooks v. Harrelson*, 282 U.S. 55, 60 (1930).

The second exception is when literal application of the statutory language would produce a result demonstrably at odds with the intent of Congress. This exception applies only when the contrary intent is clearly expressed by the legislative body. *Russello v. United States*, 464 U.S. 16, 20 (1983). In such cases, the intention of the legislature, rather than the language of the statute, controls. In the absence of express Congressional intent, a court must assume that Congress intended to convey the language's ordinary meaning.

Robinson does not disagree with any of these rules of statutory construction. Instead, he offers three arguments for interpreting the term "his employees" to include someone no longer employed by the employer.

First, Robinson argues that the term is inherently ambiguous. Robinson attempts to find ambiguity in § 704(a) by examining other decisions that have interpreted the term "employee," by reviewing other sections of Title VII, and by a pedantic discourse on the word "employed."

Second, Robinson relies on Title VII's purpose to declare that the Court is duty bound to construe "his employees" to include former employees.

Third, Robinson argues that a liberal construction of § 704(a) would be consistent with the interpretation of other anti-retaliation laws.

B. "His employees," as used in § 704(a), is not ambiguous.

1. "Individual" and "employee" are used differently in Title VII.

Title VII defines "employee" as "an individual employed by an employer" in § 701(f).[4] This definition is not entirely circular. It indicates a distinction between "individuals" and "employees," a distinction used in § 704(a).

Section 704(a) uses four nouns to describe persons protected against retaliation: "individual," "member," "applicant," and "employee." The term "employee," in context, is definitive and directly tied to the employment relationship.

Employment agencies and joint labor-management committees are prohibited from retaliating against any "individual." Labor organizations are prohibited from retaliating against any "member" or "applicant for membership." Employers are prohibited from retaliating against any of "his employees or applicants for employment."

Similarly, the anti-discrimination section, § 703,[5] incorporates a distinction between "individuals" and "employees or applicants for employment":

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[4] 42 U.S.C. § 2000e(f).

[5] 42 U.S.C. § 2000e-2.

(a) Employer practices

It shall be an unlawful employment practice for an employer --

(1) to fail or refuse to hire or to discharge any *individual*, or otherwise to discriminate against any *individual* with respect to his compensation, terms, conditions, or privileges of employment, because of such *individual's* race, color, religion, sex, or national origin; or

(2) to limit, segregate, or classify *his employees or applicants for employment* in any way which would deprive or tend to deprive any *individual* of employment opportunities or otherwise adversely affect his status as an employee, because of such *individual's* race, color, religion, sex, or national origin.
§ 703(a) (emphasis added).

Obviously, "individual" is used as a broader term than "employee" or "applicant for employment." "Employee" is a status that can be attained by an "individual." The duties of an employer toward "individuals" are different than those toward an "employee or applicant for employment." These obligations are contained in different sections; i.e., § 703(a)(1) and § 703(a)(2). This distinction is repeated with regard to labor organizations in § 703(c)(1)[6] and § 703(c)(2).[7]

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[6] 42 U.S.C. § 2000e-2(c)(1).
[7] 42 U.S.C. § 2000e-2(c)(2).

Robinson completely ignores the distinction between "individual" and "employee." Had Congress intended to prohibit retaliation by an employer against former employees it could have easily substituted the term "individual" for "his employees or applicants for employment" in § 704(a).

This is exactly what Congress has done in recent employment legislation. Both the Americans with Disabilities Act of 1990[8] and the Family and Medical Leave Act of 1993[9] prohibit retaliation against any "individual." There is no question that these statutes would protect former employees from retaliation. Significantly, both of these statutes were written at a time when Congress passed the Civil Rights Act of 1991.[10] The 1991 act dramatically changed the damages available under Title VII, the availability of a jury trial, and the burden of proof in some cases. There was no change to the wording of the anti-discrimination section or the anti-retaliation section. The terms "employee" and "individual" remained as before.

In the alternative, had Congress intended to prohibit retaliation by an employer against former employees it could have easily included the term "former employee" with "his employees or applicants for employment" in § 704(a).

This is exactly what Congress has done in other legislation when it wanted to include former employees within the protection of a statute; i.e., The Congressional Accountability Act of 1995[11] ("The term 'employee' includes an applicant for employment and a former

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[8] 42 U.S.C. § 12203.
[9] 29 U.S.C. § 2615.
[10] 42 U.S.C. § 1981a, *et cetera*.
[11] 2 U.S.C. § 1301(4).

employee."); The Whistleblower Protection Act of 1989[12] ("employee, former employee, or applicant for employment"); The Internal Revenue Code[13] ("For purposes of this subsection, the term 'officer or employee' includes a former officer or employee."); The Federal Credit Union Act[14] and The Federal Deposit Insurance Corporation Act[15] ("Any employee or former employee who believes he has been discharged or discriminated against in violation of subsection (a)...."); and The Occupational Safety and Health Act[16] ("Such regulations shall also make appropriate provision for each employee or former employee to have access to such records as will indicate his own exposure to toxic materials or harmful physical agents.").

In light of these statutes, it can hardly be argued that the omission of former employees from the protection of § 704(a) was inadvertent or unforeseen. There is no ambiguity.

2. Decisions by the Court interpreting other statutes and by the Courts of Appeal interpreting § 704(a) are not controlling.

Nevertheless, Robinson attempts to find ambiguity in the word "employee" by focusing on interpretations of the word as it appears in other statutes. This is of little use in interpreting § 704(a). As Robinson acknowledges, the Court has recognized that "employee" is not a term of art with a definite meaning but takes its color from its surroundings in

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12 5 U.S.C. §§ 1212(a)(1), 1213(a)(1), 1214(a)(3), and 1221.
13 26 U.S.C. §§ 79(e), 5000(b), and 6096.
14 12 U.S.C. § 1790b(b).
15 12 U.S.C. § 1831j.
16 29 U.S.C. § 657(c)(3).

the particular statute. *National Labor Relations Board v. Hearst Publications, Inc.*, 322 U.S. 111, 124 (1944).

Robinson has found several instances where either a statute or the Court has used the term "employee" in a generic sense; i.e., as in a "worker." *See, e.g., Nash v. Florida Industrial Commission*, 389 U.S. 235 (1967) (an individual who claimed that she had been wrongly discharged is referred to as an "employee" and as a "person" in an action seeking unemployment compensation benefits); *see also, Hobbie v. Unemployment Appeals Commission of Florida*, 480 U.S. 136 (1987) (another individual who had been discharged and challenged a denial of unemployment compensation benefits is referred to as an "employee"), and *California Department of Human Resources Development v. Java*, 402 U.S. 121 (1971) (persons protected by § 303(a)(1) of the Social Security Act[17] are variously referred to as "claimants," "employees," "workers," "unemployed workers," and "people").

Similarly, *Allied Chemical & Alkali Workers of America, Local Union No. 1 v. Pittsburgh Plate Glass Company, Chemical Division*, 404 U.S. 157 (1971), cited by Robinson, also discusses the use of "employees" in a generic sense. The Court held that a mid-term unilateral modification by an employer of pension benefits for retired employees was not an unfair labor practice because retired employees were not covered by the National Labor Relations Act.[18] The Court noted that neither the purpose nor the legislative history of the N.L.R.A. indicated that retired employees were to be included within the coverage of the act.

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17 42 U.S.C. § 503(a)(1).
18 29 U.S.C. § 151, *et seq.*

"The Act, after all, as § 1 makes clear, is concerned with the disruption to commerce that arises from interference with the organization and collective-bargaining rights of 'workers' -- not those who have retired from the workforce. The inequality of bargaining power that Congress sought to remedy was that of the 'working' man, and the labor disputes that it ordered to be subjected to collective bargaining were those of employers and their active employees. Nowhere in the history of the National Labor Relations Act is there any evidence that retired workers are to be considered as within the ambit of the collective-bargaining obligations of the statute.

> To the contrary, the legislative history of § 2(3) itself indicates that the term 'employee' is not to be stretched beyond its plain meaning embracing only those who work for another for hire."
> 404 U.S. at 166.

The Court distinguished prior National Labor Relations Board decisions involving applicants for employment by making it clear that "employees" was used generically within the N.L.R.A. to indicate members of the general work force.

> "Illustrative are cases in which the Board has held that applicants for employment and registrants at hiring halls -- who have never been hired in the first place -- as well as persons who have quit or whose employers have gone out of business are 'employees'

> embraced by the policies of the Act. Yet all of these cases involved people who, unlike the pensioners here, were members of the active work force available for hire and at least in that sense could be identified as 'employees.' No decision under the Act is cited, and none to our knowledge exists, in which an individual who has ceased work without expectation of further employment has been held to be an 'employee.'"
> 404 U.S. at 168 (citation omitted).

This hardly means that "employee" was used in a generic sense in Title VII. If it had been, there would have been no need to use the all-embracing term "individual" or the more restrictive terms "member" and "applicant."

If the Court were to accept Robinson's suggestion that "employee" can be read as a generic reference, there is the further limitation of the adjective "his." Employers are prohibited from retaliating against "his employees," not employees in general. If a person no longer works for his former employer, he is not one of "his employees" even if he is still a member of the active work force.

Naturally, Robinson also relies on the decisions of the Courts of Appeals that are in conflict with the Fourth Circuit decision in this case. That reliance is misplaced. These contrary decisions were based on broad policy considerations. Each of these decisions totally disregarded, without explanation, the established analytical framework for statutory construction.

In *Rutherford v. American Bank of Commerce*, 565 F.2d 1162, 1165 (10th Cir. 1977), the Tenth Circuit stated merely that a literal reading of the statute would result in a

narrow interpretation not justified by its legislative history. The court did not cite anything in the Congressional record regarding legislative history. Instead, the court merely opined that a remedial statute should be liberally construed.

The Second Circuit relied on *Rutherford* and held that a narrow construction would not give effect to the statute's purpose. *Pantchenko v. C.B. Dolge Company, Inc.*, 581 F.2d 1052, 1055 (2nd Cir. 1978).

The Ninth Circuit offered no analysis when it mentioned in passing that an allegation of a bad recommendation after termination was sufficient to assert a retaliation claim. *O'Brien v. Sky Chefs, Inc.*, 670 F.2d 864, 869 (9th Cir. 1981).

The Eleventh Circuit relied on the prior opinions by the Tenth and Second Circuits and held that a strict interpretation of the statute "would undercut the obvious remedial purposes of Title VII." *Bailey v. USX Corp.*, 850 F.2d 1506, 1509 (11th Cir. 1988).

The Third,[19] D.C.,[20] and Fifth Circuits[21] have made similar pronouncements in cases involving the identical anti-retaliation provision in the Age Discrimination in Employment Act.[22]

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[19] *Charlton v. Paramus Board of Education*, 25 F.3d 194, 198-200 (3rd Cir. 1994).

[20] *Passer v. American Chemical Society*, 935 F.2d 322, 331 (D.C Cir. 1991).

[21] *Equal Employment Opportunity Commission v. Cosmair, Inc., L'Oreal Hair Care Division*, 821 F.2d 1085, 1088 (5th Cir. 1987). *Cosmair* was cited as the basis for the same holding under § 704(a) in *Equal Employment Opportunity Commission v. J.M. Huber Corporation*, 927 F.2d 1322 (5th Cir. 1991).

[22] 29 U.S.C. § 623(d).

In *Veprinsky v. Fluor Daniel, Inc.*, __ F.3d __, 1996 WL 34821 (7th Cir. 1996), a decision not cited by Robinson but which supports his position, the Seventh Circuit clarified its prior decision in *Reed v. Shepard*, 939 F.2d 484 (7th Cir. 1991). The Seventh Circuit held that § 704(a) did apply to former employees so long as the alleged retaliatory acts were related to the plaintiff's employment. The decision was based on familiar policy arguments and the rationale that, unless former employees are covered by § 704(a), a plaintiff could be fired in retaliation for a protected activity without recourse. This is nonsense. The plaintiff in that situation would be an "employee" at the time of the retaliatory act (the discharge) and would have standing to sue under § 704(a).

Neither the decisions of this Court construing other statutes nor the decisions of the Courts of Appeal construing § 704(a) is persuasive authority that "his employees," as used in § 704(a), is ambiguous.

3. "Employee" is not used differently in other sections of Title VII.

Robinson next attempts to convince the Court that the term "employee" is ambiguous by reviewing sections of Title VII, other than § 703 and § 704(a), that contain the term "employee." Robinson has combed the statute in an effort to show that "employee" was used to designate current, future, and former employees. Robinson's examples range from the fanciful to the farfetched.

a. "Employee" is not used to designate former employees.

Like the Seventh Circuit's recent decision in *Veprinsky v. Fluor Daniel, Inc., supra,* Robinson argues that since only an "employee and applicant for employment" can file a civil suit or is entitled to receive notification of final agency action under § 717,[23] then "employee" must include former employee or else a terminated employee would have no cause of action for discrimination. Robinson also points to § 706(g)(1)[24] which provides for reinstatement of "employees." Isn't the plaintiff in both situations an "employee" at the time of the adverse employment action; i.e. discharge?

Robinson cites the provisions of Title VII that restrict employees of the E.E.O.C. from disclosing certain information; i.e., § 706(b),[25] and § 709(e).[26] Robinson cites § 714[27] which establishes criminal penalties for actions taken against employees of the commission in the performance of their official duties. Even if these provisions do apply to persons after they have left the employment of the E.E.O.C., they have nothing whatever to do with the prohibitions on employers not to discriminate against individuals or to retaliate against "his employees."

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23 42 U.S.C. § 2000e-16.
24 42 U.S.C. § 2000e-5(g)(1).
25 42 U.S.C. § 2000e-5(b).
26 42 U.S.C. § 2000e-8(e).
27 42 U.S.C. § 2000e-13.

b. "Employee" is not used to designate future employees.

Robinson claims that "employees" must mean future employees in § 701[28] since both an "employment agency" and a "labor organization" are defined as entities that procure "employees." Robinson also points to § 703(e)[29] which allows an employer, under some circumstances, "to hire and employ employees" on the basis of religion, sex, or national origin. Robinson reasons that an individual cannot become an employee until he is actually employed. Therefore, an employment agency or labor organization cannot procure "employees" but only prospective or future employees. Similarly, he says that an employer does not hire "employees" but individuals who then become "employees." Such sophistic reasoning cannot be taken seriously. If "employee" includes individuals to be hired for future employment, then why does § 704(a) specifically protect "applicants for employment?"

c. "Employee" is used to designate current employees.

By contrast, "employee" is clearly used to designate current employees in § 701(b)[30] which defines an employer as an entity which has "fifteen or more employees." If "employee" is interpreted to include former employees it would cause a dramatic expansion of Title VII. No longer would small employers be exempt from the act. Any employer who had a total of 15 or more former employees would be subject to the act, regardless of the number of current employees. An employer with 5 active employees

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28 42 U.S.C. § 2000e.
29 42 U.S.C. § 2000e-2(e).
30 42 U.S.C. § 2000e(b).

but a high turn over would suddenly be subject to a 30 year old act that ostensibly provides an exemption for small businesses.

"Employee," as used in § 701(b), clearly refers to current employees. The same meaning should be used for "employee" in § 704(a). *See, e.g., Commissioner of Internal Revenue v. Keystone Consolidated Industries, Inc.*, 508 U.S. 152, 159 (1993) ("It is a 'normal rule of statutory construction' that identical words used in different parts of the same act are intended to have the same meaning."), and *BFP v. Resolution Trust Corporation*, __ U.S. __, 114 S.Ct. 1757, 1771 (1994) *dissent by Justice Souter* ("A common rule of construction calls for a single definition of a common term occurring in several places within a statute.").

4. "An individual employed by an employer" is not ambiguous.

Finally, Robinson is reduced to arguing that "employee" is ambiguous because Robinson cannot tell if the definition ("an individual employed by an employer") was written in the present tense, passive voice or the past tense in either the active or passive voice. In other words, when an employer is prohibited by law from taking certain actions against "his employees," Robinson cannot tell if the employer is prohibited from taking action against his present employees or against anyone who has ever been employed by him. Certainly, an employer would know the difference. An employer knows who "his employees" are.

In common usage, an individual who is no longer employed by a company never refers to himself as an "employee." Any individual knows immediately if he is employed. If an individual once worked at a company but does so no longer, he refers to himself as a former

employee, or ex-employee, or retiree. No former employee would mistakenly refer to himself as an "employee" of his former employer.

As an employer itself, Congress knows who its employees are. It is absurd to suggest that it is unclear what Congress meant by prohibiting an employer from retaliating against "his employees."[31]

C. The text and purpose of Title VII do not demand that former employees be protected by § 704(a).

Robinson begins his discussion of the purpose of Title VII by focusing on the importance of protecting individuals who bring violations of the law to the attention of federal officials. While this is certainly a worthwhile goal, it is no license for imposing new terms that do not appear in the statute. *Director, Office of Workers Compensation Programs, Department of Labor v. Newport News Shipbuilding and Dry Dock Company*, __ U.S. __, 115 S.Ct. 1278 (1995).

> "Finally, the Director retreats to that last redoubt of losing causes, the proposition that the statute at hand should be liberally

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[31] It is also ridiculous to suggest that the Court would have to repudiate portions of *Public Employees Retirement System of Ohio v. Betts*, 492 U.S. 158 (1989), unless it expands § 704(a) to include former employees. *Betts* considered whether a retirement system adopted by the state of Ohio violated the Age Discrimination in Employment Act of 1967 (ADEA), 29 U.S.C. § 621, *et seq.*, by discriminating against employees on account of age. Robinson argues that *Betts* would have to be repudiated because the ADEA uses the same definition of employee as Title VII. Not only is the term "employee" not in issue in *Betts*, Robinson ignores the fact that the ADEA, like Title VII, prohibits discrimination against "individuals." 29 U.S.C. § 623(a)(1).

construed to achieve its purpose. That principle may be invoked, in case of ambiguity, *to find present rather than absent elements* that are essential to operation of a legislative scheme; but it does not add features that will achieve the statutory "purposes" more effectively. Every statute proposes, not only to achieve certain ends, but also to achieve them by particular means -- and there is often a considerable legislative battle over what those means ought to be. The withholding of agency authority is as significant as the granting of it, and we have no right to play favorites between the two."
115 S.Ct. at 1288 (citation omitted, emphasis added).

It is not necessary to effectuate the purpose of § 704(a) that former employees be included in its protection. Section 704(a) protects two classes of persons against retaliation by an employer: his employees and applicants for employment. Neither of these two classes would be affected by a decision by this Court not to expand the protection to a third class of former employees. Employees will still be able to sue their employers for retaliation. Applicants for employment will still be able to sue their prospective employers for retaliation. The rights of those specifically named in the statute will be unaffected.

If mere consistency with the purpose of Title VII were enough to expand the protection of § 704(a) to former employees, then why stop there? Why not declare that an employer cannot retaliate against *anyone*? Surely the policy arguments in favor of an anti-retaliation statute are the same for anyone exercising a right under Title VII. However, the Court cannot second-guess Congress' decision to not write such a broad act.

1. Former employees are protected by statutory and common law remedies.

Robinson raises the specter of unrestrained revenge should the Court decline to expand the coverage of § 704(a).

> "Blacklisting is not the only or necessarily the worst form of reprisal that an employer could inflict on a former employee. Employers might cut off a former employee's severance payments or medical insurance, block disbursement of funds owed to the former employee in an employee benefit plan, seek the revocation of the individual's teaching certificate or other professional license, forbid a nurse to work for any doctor practicing in a hospital, arrange to have the charging party removed from civil service eligibility lists, persuade a subsequent employer to dismiss the charging party, file a baseless civil suit, orchestrate a groundless arrest and criminal prosecution of a charging party, or even resort to physical violence."
> Brief for Petitioner at p. 26 - 27.

Robinson ignores the fact that former employees are already protected from each of the abuses listed by statutory and common law remedies.

a. Federal and state laws as well as common law causes of action adequately protect former employees.

Blacklisting is prohibited by the National Labor Relations Act.[32]

Severance payments, medical benefits and other employee benefit plans are protected by the Employee Retirement Income Security Act of 1974.[33]

Attempts to revoke a license or block hospital privileges are actionable under the common law causes of action for intentional interference with a prospective business advantage or intentional interference with contractual relations. [34]

Baseless civil suits, arrests and criminal prosecutions are all actionable under the common law causes of action for abuse of process[35] and malicious prosecution.[36]

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32 29 U.S.C. § 158(a)(3).

33 29 U.S.C. § 1001, *et seq.*

34 The elements of these causes of action in Maryland, where this case arose, are listed in *Bagwell v. Peninsula Regional Medical Center*, 106 Md. App. 470, 665 A.2d 297, *cert. denied* 341 Md. 172, 669 A.2d 1360 (1995).

35 The elements of this cause of action are listed in *Humphrey v. Herridge*, 103 Md. App. 238, 653 A.2d 491 (1995).

36 The elements of this cause of action are listed in *K-Mart Corporation v. Salmon*, 76 Md. App. 568, 547 A.2d 1069 (1988).

Physical violence is actionable under the common law torts of assault and battery.[37]

Of course, the most obvious remedies available to a former employee who believes that his former employer has issued a false job reference are contained in a cause of action for defamation and in § 704(a) itself.

b. A false employment reference can form a basis for a cause of action for defamation.

Robinson could have sued Shell for defamation for giving a reference to a prospective employer that contained false information.[38] Of course, Robinson would have had to prove that the statements made by Shell to Metropolitan Life Insurance Company were false. This would have been difficult, if not impossible, given the outcome of Robinson's first suit against Shell.

Robinson originally sued Shell following the termination of his employment. He alleged that Shell had fired him on the basis of his race in violation of § 703. That suit was tried in the United States District Court for the District of Maryland in April, 1994, and resulted in a judgment in favor of Shell. As a necessary part of the

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37 Interestingly, one of the Courts of Appeal that has held that former employees are protected by § 704(a) has not been willing to expand that protection to cover physical acts. *Nelson v. Upsala College*, 51 F.3d 383, 388 (3rd Cir. 1995) ("For instance, if an employer physically assaults a former employee or burns down her house in retaliation for the employee having brought a Title VII charge, relief might not be available under § 704."). *See also, Veprinsky v. Fluor Daniel, Inc., supra* at 11.

38 *See, e.g., Jacron Sales Co., Inc. v. Sindorf*, 276 Md. 580, 350 A.2d 688 (1976).

defense of that case, Shell presented evidence on the reasons for termination. The reasons for termination included poor attendance and below average performance in each of the following categories: performance of duties, ability to work harmoniously with others, ability to work conscientiously and for long hours away from close supervision, sincerity and integrity, moral habits, ability to live within his means or meet his obligations, judgment and quick thinking abilities, trustworthiness in handling money, and effectiveness in making sales.

The District Court found that Shell had articulated legitimate, non-discriminatory reasons for firing Robinson. There was no evidence that the reasons articulated were a pretext for race discrimination. There was no appeal of that case.

Therefore, the reasons for Robinson's dismissal have already been litigated and proven true. The reasons for termination were the basis for Shell's response to the reference check by Metropolitan Life.

c. Section 704(a) provides a cause of action against prospective employers.

Even § 704(a) offers protection to former employees once they apply for another job. If (i) a person applies for a job with a new employer, (ii) the old employer tells the new employer that the person opposed an unlawful employment practice, made a charge, testified, assisted, or participated in any manner in an investigation, proceeding, or hearing, and (iii) the new employer rejects the person for the job on the basis of that information, then the person would have a cause of action under § 704(a) against the new

employer. The person would be an "applicant for employment" and clearly protected by § 704(a) against retaliation by the *new employer*.

Of course, Robinson would have had problems suing Metropolitan Life under § 704(a) for rejecting his application for employment based on the information supplied by Shell. Even though Robinson would have had standing to bring such an action as an "applicant for employment," the reference by Shell made no mention of any activity by Robinson protected by Title VII.

In the context of employment references, Congress chose to offer protection to former employees only against retaliation by future employers. Such protection is consistent with the remedies originally available under Title VII.

2. The original remedies available under Title VII and the limitations period indicate that § 704(a) should not apply to former employees.

Title VII originally provided only equitable relief such as reinstatement, back pay, and injunctions against further violations. These equitable remedies were particularly suited to making a complainant whole without penalizing the employer. Congress did not intend to punish employers by imposing large monetary awards. In successful Title VII actions, an applicant would be hired; an employee would be promoted or reinstated to a job that was denied. However, it is much more difficult to fashion equitable relief for a former employee.

Since the remedies available under Title VII are not suited for post-employment events, those courts that have recognized a cause of action for former employees have been

forced into hair-splitting decisions over what is "reasonably related to the employment." For example, the District of Columbia Circuit has held that the cancellation of a symposium in honor of a former employee could be an act of retaliation that stated a claim for relief under § 704(a).[39] However, the Third Circuit has held that barring a former employee from the work place is not reasonably related to the employment so as to form a basis for a claim of retaliation under § 704(a).[40] Both decisions seem to be influenced by the ability of the court to fashion relief for the alleged harm.

Expansion of § 704(a) would also create a cause of action at odds with the strict limitations period applied to other Title VII actions. Under § 706(e)(1)[41] a person claiming to be aggrieved must file a charge within 180 days (in some cases, 300 days) of the alleged unlawful employment practice. This limitations period begins to run when the unlawful employment practice occurs. *Delaware State College v. Ricks*, 449 U.S. 250 (1980). This short limitations period indicates an intention by Congress to quickly resolve employment disputes. However, if § 704(a) is expanded to include former employees, a charge of retaliation could be filed years after the employment relationship has ended. As pointed out by Circuit Judge Manion in dissent in *Veprinsky v. Fluor Daniel, Inc., supra*, it is logical to conclude that Congress intended to end all claims at the termination of employment.

> "Moreover, contrary to statements by this and other courts that Congress just could not have intended to leave former employees

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39 *Passer v. American Chemical Society, supra.*

40 *Nelson v. Upsala College, supra.*

41 42 U.S.C. § 2000e-5(e)(1).

> unprotected, ante at 21-22, there are good reasons for their exclusion. Had Congress defined "employee" to include both those "employed" as well as those "formerly employed," it would have created a cause of action unlimited in time. A cause of action for retaliation could be brought one, five, or even twenty years after the job ended (since the cause of action would not accrue until the alleged retaliation occurred). Congress had to draw a line. It did so at the most logical point - the end of the employment relationship. In effect, § 704 works as a statute of repose. Just like a statute of repose, one day an individual has a claim and the next he does not. No more than a statute of repose, this is not 'grossly absurd or a plainly unintended result.'"
> 1996 WL 348212 at 18.

Therefore, both the original remedies available under Title VII and the limitations period for filing a charge indicate that Congress did not intend to include former employees within the protection of § 704(a).

This conclusion is not undermined by the legislative history. Robinson has cited two instances where a reference is made to retaliation against a *person*. This is broader language than Congress chose in the final version of the statute. As discussed previously, there is no indication that "his employees" was meant to be a generic reference to all workers. Any conflict between statements in the legislative history and the statute itself must be resolved in favor of the statutory language. *Holder v. Hall*, __ U.S. __, 114 S.Ct. 2581, 2613 (1994) *concurring opinion by Justice Thomas* ("I would have thought the key to resolving any such conflict

between the text and the legislative history obvious: the text of the statute must control ....").

The legislative history does indicate that "employer" was meant to have its normal and customary meaning.

> "Question. Who is an employer within the meaning of Title VII? I am not sure, the bill is indefinite. We have no committee hearings to report. Can an employer readily ascertain from the language of the bill whether or not he is included? Employers with a large number of employees will have no difficulty, but what of the small businessman?
>
> Answer. The term "employer" is intended to have its common dictionary meaning, except as expressly qualified by the act."
> 110 Cong. Rec. 7216 (1964) (Response to Sen. Dirksen Memorandum).

It would seem appropriate, therefore, that "employee" also be given its normal and customary meaning.

3. There are differences between § 703(a) and § 704(a).

Robinson characterizes an employment reference as an employment benefit that accrues after the termination of employment. Therefore, he argues, since a former employee *alleging discrimination* in the denial of a post-employment benefit could file suit under § 703(a), a former employee *alleging retaliation* in the denial of a post-employment benefit should be able to file suit under § 704(a).

This argument is based on *Hishon v. King & Spaulding*, 467 U.S. 69 (1984). In *Hishon*, a female associate at a law firm alleged that she had been rejected for partner on the basis of her sex in violation of § 703(a). The Court held that consideration for partnership was a benefit or privilege of employment and, therefore, could not be withheld on the basis of race, color, religion, sex, or national origin.

The Court rejected the argument that consideration for partnership could not be a benefit of employment since the associate would have to terminate her employment as an associate in order to become a partner. The Court held that it was of no consequence that employment as an associate necessarily ends when an associate becomes a partner.

> "A benefit need not accrue before a person's employment is completed to be a term, condition, or privilege of that employment relationship."
> 467 U.S. at 77.

If an employment reference is considered a benefit of employment, that benefit could not be withheld on a discriminatory basis under § 703(a).

Robinson wants to apply the same logic to § 704(a). If an employer could not deny this benefit to a person alleging discrimination, why should an employer be able to deny this benefit to a person alleging retaliation?

This argument ignores the wording of both § 703(a) and § 704(a). As discussed previously, *individuals* are protected against discrimination with respect to "compensation, terms, conditions, or privileges of employment" under § 703(a)(1). Section 704(a) only

prohibits an employer from retaliating against "his employees and applicants for employment." "Individual" is broad enough to encompass former employees. "Employees" is not.

There are also valid policy reasons that would explain why Title VII offers more protection to persons alleging discrimination than it does to persons alleging retaliation. At the time Title VII was passed there was no remedy available to persons who alleged that they were denied a job on the basis of their race, color, religion, sex, or national origin. Title VII was passed to protect such individuals. Title VII is not a general tort statute. It is an employment law statute. It does not protect persons from discrimination outside of the workplace. The main purpose of Title VII is to allow an individual to apply for a job and receive the benefits of that job on a non-discriminatory basis.

Protection against retaliation is not the main purpose of Title VII. Retaliation is a secondary consideration in Title VII. Title VII does provide for protection against retaliation but on a more limited basis. Title VII provides protection against retaliation for employees while they are employed. Title VII provides protection against retaliation for applicants for employment against *prospective employers*. It is entirely possible that Congress thought it irrelevant or unnecessary to provide former employees protection against former employers. Former employees are not seeking employment from their old employer and are adequately protected by other statutory and common law remedies from anything a former employer might do to hinder their employment elsewhere.

D. The protection of former employees under § 704(a) would conflict with state laws and lead to absurd results.

Robinson recognizes the importance to employers of obtaining job references concerning applicants for employment. However, expanding § 704(a) to include former employees would conflict with state laws protecting employment references and lead to absurd results.

1. The expansion of § 704(a) would conflict with state laws protecting employment references.

Despite the obvious benefits of honest employment references to both employers and job seekers, employers are increasingly reluctant to provide references for fear of a suit by a disgruntled former employee. One survey has indicated that 63% of personnel managers refused to provide information about former employees for fear of landing in court.[42] To protect employers and encourage honest job references, several states in recent years have passed laws providing employers with varying degrees of protection against suits alleging defamation and other claims.[43]

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[42] McMorris, *Ex-Bosses Face Less Peril Giving Honest Job References*, Wall St. J., July 8, 1996, at B1, citing a 1995 study by the Society for Human Resource Management.

[43] See; e.g., Alaska Stat. § 09.65.160 (1993); Ariz. Rev. Stat. Ann. § 23-1361 (1987); Cal. Government Code § 1031.1 (West 1993); Fla. Stat. § 768.095 (1991); Ga. Code § 34-1-4 (1993); Kan. Stat. Ann. § 44-119a (1995); La. Rev. Stat. Ann. § 291 (West 1995); Me. Rev. Stat. Ann. tit. 26 § 598 (1995); N.M. Stat. Ann. § 50-12-1 (1995); Okla. Stat. Ann. tit. 40, § 61 (West 1995); and Tenn. Code Ann. § 50-1-105 (1995). Similar bills are pending in Wisconsin and Illinois.

Obviously, expanding § 704(a) to include former employees would conflict with these laws wherever the claim of retaliation is based upon an employment reference.

2. The expansion of § 704(a) would conflict with the law of defamation.

Expansion of § 704(a) would also lead to conflicts with the common law cause of action for defamation. As discussed previously, truth is an absolute defense to any claim of defamation. In the context of an employment reference, any statement made by a former employer regarding an ex-employee cannot form the basis for a claim of defamation if the statement is true. Under a claim of retaliation in violation of § 704(a), however, truth is irrelevant. It would make no difference if the employment reference contains true statements. A disgruntled ex-employee could still allege that the motivation for issuing the reference was retaliation. Employers could be accused of retaliation even if they did no more than speak truthfully about an ex-employee.

Similarly, most states recognize a qualified privilege for employers to communicate with other employers regarding employment references.[44] These communications are entitled to a privilege unless they are made with reckless disregard for the truth or with actual knowledge of its falsity. Under a claim of retaliation in violation of § 704(a), however, the knowledge or standard of care of the employer is irrelevant. It would make no difference if the employer has acted carefully to ascertain the truth of the reference. A disgruntled ex-employee could still allege that the motivation

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[44] See, e g., *Fresh v. Cutter*, 73 Md. 87 (1890).

for issuing the reference was retaliation. Employers could be accused of retaliation no matter how carefully they checked the truth of a reference.

3. The expansion of § 704(a) would lead to absurd results.

One does not have to construct convoluted hypothetical situations to demonstrate that expansion of § 704(a) to include former employees would lead to absurd results. All one has to do is examine the facts of the two suits brought by Robinson against Shell.

Robinson has already sued Shell over the termination of his employment and lost. As part of the defense of that case, Shell proved that Robinson had a poor attendance record and was below average in the performance of his duties, in working harmoniously with others, in working conscientiously and for long hours away from close supervision, in sincerity and integrity, in living within his means and meeting his obligations, in his judgment and quick thinking abilities, and in trustworthiness to handle money. Understandably, Shell would not consider Robinson for re-employment.

All Shell did was honestly report this information to Metropolitan Life at Robinson's request. Now Shell is accused of retaliation for reporting matters that have already been established as true. Should an ex-employee be allowed to shield himself from the truth in the pursuit of another job?

If Robinson were to prevail on a suit on the merits by convincing a jury that Shell's motivation for speaking the truth was retaliation, what should be the remedy? Should Shell be enjoined from speaking the truth about Robinson's poor performance? Perhaps to help Robinson win another

job, Shell should be compelled to lie and state that Robinson's attendance was "average" and he was "average" in the various performance factors. Or maybe "average" is not good enough to convince another employer to hire Robinson and Shell should be compelled to lie and state that Robinson was "above average" in all categories and that Shell would re-employ him.

If Robinson were to prevail on a suit on the merits, what is to stop him from seeking reinstatement with Shell under § 706(g).[45] Then Robinson could return to a job he did poorly and from which he was lawfully terminated.

Perhaps, recognizing that an order compelling Shell to lie about Robinson's performance or re-employ him would be inequitable, a court could order Shell to simply pay Rooinson whatever he would have been paid by Metropolitan Life for as long as he remains unemployed.

Robinson argues passionately for the need of ex-employees to obtain honest employment references. However, there should also be some protection for a former employer against groundless claims of retaliation by a disgruntled ex-employee. This is the balance that various states have sought to achieve through the passage of employer immunity statutes and the development of the common law cause of action of defamation. This balance is also reflected in § 704(a) which limits a cause of action for retaliation by a former employee, as an "applicant for employment," to claims against a prospective employer. This balance would be destroyed by allowing a former employee to sue his former employer under § 704(a).

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[45] 29 U.S.C. § 2000e-5(g).

CONCLUSION

The wording of § 704(a) is unambiguous and the statutory scheme is coherent and consistent. Literal application will not lead to an absurd result nor will it produce a result demonstrably at odds with the intent of Congress. Therefore, the sole function of the Court is to enforce the statute according to its terms.

Robinson would have this Court construe § 704(a) to expand its scope to include former employees. This would be improper. *Iselin v. United States*, 270 U.S. 245 (1926), *majority opinion by Justice Brandeis.*

> "[The statute's] language is plain and unambiguous. What the Government asks is not a construction of a statute, but, in effect, an enlargement of it by the court, so that what was omitted, presumably by inadvertence, may be included within its scope. To supply omissions transcends the judicial function."
> 270 U.S. at 250 - 251.

The judgment of the United States Court of Appeals for the Fourth Circuit should be affirmed.

Dated: July 26, 1996

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IN THE
Supreme Court of the United States
OCTOBER TERM, 1995

CHARLES T. ROBINSON, SR.,
Petitioner,

v.

SHELL OIL COMPANY,
Respondent.

On Writ of Certiorari to the United States Court of Appeals for the Fourth Circuit

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REPLY BRIEF FOR PETITIONER

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REPLY BRIEF FOR PETITIONER

Introduction

Although supporting the result arrived at by the Fourth Circuit, respondent has abandoned, and to some degree repudiated, the central reasoning of the court of appeals below.

The Fourth Circuit insisted that the general prohibition against discrimination contained in section 703 of Title VII does not apply to any discriminatory acts by an employer occurring after the end of the employment relationship.[1] Relying on that premise, the court of appeals argued that Congress intended the scope of sections 703 and 704(a) to be co-extensive. (Pet. App. A-14 to A-15). Respondent, on the other hand, concedes — as it must in light of *Hishon v. King & Spalding*, 467 U.S. 69 (1984) — that section 703 indeed applies to former employees, and thus insists, contrary to the court below, that Congress did not intend section 704(a) to protect all the persons entitled to file charges under section 703. Respondent's Brief ("R. Br.") 34-36).[2]

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[1]Pet. App. A-14 (the Title VII definition of "unlawful employment practice" "comprises discrimination with respect to certain aspects of employment, and does not redress discriminatory practices *after* the employment relationship has terminated") (emphasis in original); *id.* at A-15 ("Title VII does not redress discriminatory practices, however reprehensible, which occur after the employment relationship has ended").

[2]R. Br. 9 ("There are legitimate reasons for offering more protection against discrimination than retaliation").

Although respondent contends that Congress intended section 704(a) to be narrower than the substantive prohibitions of section 703, it is clear on the face of the statute that section 704(a) is broader in at least two respects. First, although section 703, in conjunction with section 706, provides a remedy only to persons who have filed timely and meritorious charges, section 704(a) provides remedies to all persons retaliated against for filing charges, regardless of whether those charges

The Fourth Circuit relied heavily on the definition of "employee" contained in section 701(f) of Title VII. We noted in our opening brief the inherent ambiguity in that statutory definition, stemming from the two different meanings of the word "employed" (P. Br. 17-19). In this Court, respondent disdains any analysis of the definition contained in section 701(f), asserting instead that "an employer knows who 'his employees' are" (R. Br. 24). Respondent does not of course suggest that section 701(f) defines "employee" as "the people whom employers call their employees." Rather, respondent grounds its argument, not on the statutory definition, but on what it asserts is vernacular usage among employers.[3]

I. The Statutory Language

At this point there appear to be two areas of agreement between the parties. First, both parties concur that the term "employee" is at times utilized to refer to former as well as current employees; respondent calls this the "generic sense" of the term. *Compare* R. Br. 17-19 *with* P. Br. 8-13. Second, the parties agree that the correct interpretation of the word "employee" in section 704(a) turns at least in part on the manner in which that term is employed in Title VII. *Compare* R. Br. 9 ("'Employee' must be understood within the context of Title VII") *with* P. Br. 13 *et seq.*

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ultimately failed either on the merits or on some procedural ground. Second, although section 703 provides remedies only for persons who are themselves victims of employment discrimination on the basis of race, color, religion, gender or national origin, section 704(a) protects persons who never themselves suffered such discrimination, but who were penalized for having opposed discrimination against others.

[3]Contrary to respondent's description of common usage, a company might well refer to one of its retirees as a "long time Widget Company employee."

Respondent insists that the term "employee" in section 704(a) must refer only to current employees because Title VII *always* uses "employee" in this narrower sense alone. "Title VII consistently uses 'employee' to refer to current employees" (R.Br. 9).[4]

In our opening brief we noted that in nine different instances Title VII uses the word "employee" in a context which clearly includes former employees (P. Br. 14). With regard to the remedial provisions of sections 706(g)(1) and 717, respondent asserts that the term "employee" means "'employee' at the time of the adverse employment action; i.e. discharge" (R. Br. 22). But a person who was an employee "at the time of the adverse employment action" is not a "current" employee but a former employee, albeit a particular kind of former employee.[5] When section 717(b) requires "that an employee . . . be notified of any [administrative] action taken on any complaint," and section 717(c) authorizes the filing of a civil action by an "employee" "[w]ithin 90 days of receipt of notice of final [agency] action" the statute is clearly referring, not to events that will occur at "the time of the adverse employment action" but at a point in time well after that adverse action has occurred — and after the plaintiff in a discharge case will have ceased to be a current employee.

Three provisions of Title VII refer to "employees" of the EEOC (see P. Br. 14-15). Respondent does not deny

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[4]See R. Br. 21 ("'Employee' is not used differently in other sections of Title VII"), 24 ("identical words used in different parts of the same act are intended to have the same meaning.")

[5]Respondent's reformulation is also insufficient to make sense of section 717; if "employee" meant only an individual employed at the time of the adverse action, section 717 would not apply, for example, if agency officials decided to terminate pensions for all African-American retirees, or to refuse to provide job references for laid-off female workers.

that these provisions apply to former EEOC workers, but simply asserts that

> they have nothing whatever to do with the prohibitions on employers not to discriminate against individuals or to retaliate against "his employees."

(R. Br. 22). While the subject matter of these three provisions is not the relationship between private employers and their former employees, the use of "employee" in these sections to encompass former EEOC workers manifestly is relevant to, and refutes, respondent's assertion that "employee" is "consistently" used in Title VII to refer solely to current employees.

In our opening brief we noted that in six instances Title VII uses the term "employee" where Congress must have meant to include, or have been referring exclusively to, future employees (P. Br. 15-16). Respondent's somewhat cryptic response to these provisions reads as follows:

> Such sophistic reasoning cannot be taken seriously. If "employee" includes individuals to be hired for future employment, then why does § 704(a) specifically protect "applicants for employment?"

(R. Br. 23.) Respondent appears to contend that "employee" never includes future employees (R. Br. 23). If that were the case, however, the six sections discussed in our opening brief would be nonsensical; the BFOQ clause, for example, would apply only to job applicants who were already employed elsewhere, but not to out-of-work applicants. The answer to the question posed by respondent is readily apparent: even though "employee" is used in Title VII to refer to future employees, section 704(a) included a reference to applicants to assure that its protections would apply to retaliation against *unsuccessful* applicants, *e.g.*, to an

employer which refused to hire someone because of his or her participation in protected activities.[6]

Respondent suggests that if Congress had intended section 704(a) to protect former employees, it would have utilized the term "individual" rather than "employee" in that provision. (R. Br. 15) But use of the term "individual" would have expanded the scope of section 704(a) far beyond former employees; redrafted in that way, the section would have applied to the entire population of the United States.[7] Although the section 703(a) prohibition regarding discrimination by employers uses the term "individual," it does so in a way that could encompass only current or

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[6]Respondent appears to assume that the "applicant" clause of section 704(a) refers to and protects only individuals who were current applicants at the time of the retaliation. But Title VII frequently uses the term "applicant" to refer to an individual who was actively seeking employment at some point in the past. See, *e.g.*, sections 717(b) ("applicants" to receive notice of final agency action), 717(c) ("applicants" can bring civil action). If the term "applicant" in section 704(a) indeed protects from retaliation individuals who were applicants prior to, but not at the time of, the retaliatory act, exclusion of former employees would be particularly strange, since an individual who had never worked for the employer in question would enjoy greater protection than one who had.

[7]The anti-retaliation provision of the Americans With Disabilities Act of 1990 is deliberately framed to cover any "individual," 42 U.S.C. § 12203, even absent any employment connection between the retaliator and the victim, because most of the substantive rights created by the ADA deal with non-employment matters. *E.g.*, 42 U.S.C. §§ 12141-65 (access to public transportation), 42 U.S.C. §§ 12181-89 (access to public accommodations).

The anti-retaliation provision of the Family and Medical Leave Act refers to retaliation against any "individual," 29 U.S.C. § 2615, but the civil cause of action created by the FMLA is limited to claims by "eligible employees." 29 U.S.C. § 2617(a)(1).

former employees or applicants.[8] Similarly, Congress could not, as respondent suggests, have reached former employees simply by deleting the possessive "his" before "employees" (R. Br. 19); that change would have encompassed every employee of every employer in the United States, but would not — on respondent's view — have applied to former employees, like petitioner, who were out of work at the time of the retaliatory act.

Of course, Congress could have addressed this issue more specifically. The drafters could have more clearly indicated a desire to include former employees within the scope of section 704(a) by using the very words "former employee" in the text of the statute, or they could have used the phrase "current employee" rather than "employee" to exclude former employees unequivocally. The mere fact that either meaning might have been, but was not, set forth expressly does not prove that the contrary meaning was intended. Although Congress clearly intended that other provisions of Title VII apply to current and/or future and/or former employees, the framers of that legislation never used the words "current," "former," or "future," but left the

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[8]Section 703(a)(1), for example, makes it an unlawful employment practice to "fail or refuse to *hire* or to *discharge* any individual or otherwise to discriminate against any individual with respect to his *compensation, terms, conditions, or privileges of employment*, because of such individual's race . . ." (emphasis added). The only "individual" to whom this section could apply would be a job applicant or current or former employee.

Although the anti-retaliation provisions in section 704(a) regarding employment agencies and joint apprenticeship committees refer to "individuals," that is because "individuals" is the term used in section 703 to denote the persons protected from discrimination. These substantive and anti-retaliation provisions do not use the term "employee" because the persons against whom an employment agency or joint apprenticeship committee might discriminate are not ordinarily their employees.

appropriate meaning of "employee" to be divined from the particular context in which that word was utilized.[9]

The fact that Congress expressly forbade employer retaliation against "applicants" is not inconsistent with construing "employee" to include former employees. Although "employee" is used throughout Title VII to refer to past or future as well as current employees, Congress often included the term "applicant" in other sections when it wished to make clear that job seekers were to be protected. It is scarcely to be believed that Congress, by adding the term "applicants" to section 704(a) to assure that job seekers would be protected against retaliation, intended also covertly to narrow dramatically the scope of section 704(a) by excluding former employees. On the contrary, the express inclusion of applicants would make no sense if Congress intended to exclude former employees from the scope of section 704(a), because the inclusion in the provision of applicants would permit a former employee seeking work elsewhere to obtain the protections of section 704(a) by the simple step of also filing a job application with his former employer, thus becoming an "applicant."

To be sure, as respondent notes, Congress has at times made express reference to former employees in other statutes (R. Br. 15-16). But respondent does not deny that at times Congress has also used the term "employee" in

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[9]Respondent attaches significance to the fact that Congress did not amend section 704(a) in 1991 when it amended Title VII, despite the fact that two other statutes enacted in the early 1990s referred expressly to former employees (R. Br. 15). But at the time when Congress adopted the 1991 amendments to Title VII, all the appellate decisions to have reached the issue had held that section 704(a) did apply to former employees. The first decision clearly to the contrary, *Polsby v. Chase*, 970 F.2d 1360 (4th Cir. 1992), *vacated sub nom. Polsby v. Shalala*, 507 U.S. 1048 (1993), did not occur until July 1992, some eight months after the adoption of the 1991 amendments.

other statutes to refer to former employees (R. Br. 16-19). "Employee" is a relatively elastic term which this Court, and Congress, have understandably used in a variety of ways. The term "employee" appears in more than 5100 sections in the United States Code.[10] It would be quite impossible for Congress to review all those statutes whenever it used the term in new legislation; it would be astounding if Congress could use such a general term in thousands of statutes without considerable variation in context, intent and meaning. The meaning of the term "employee" in a particular provision must be gleaned, not from the divergent ways in which the word is used in other laws, but from the context and purpose of the specific statute in question.

We noted in our opening brief that the authoritative interpretations of section 704(a) in the legislative history of Title VII repeatedly refer to its protections as extended to "persons" (P. Br. 34). Respondent argues, "This is broader language than Congress chose in the final version of the statute" (R. Br. 33). Respondent evidently misapprehends what occurred during the enactment of Title VII. At the time when the Clark-Case Memorandum described the precursor of section 704(a) as protecting "persons," the relevant language of that section was precisely the same as "the final version of the statute" — "employee."[11]

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[10]A LEXIS search of the USCODE file for "text(employee)" identifies 5167 sections. The term is used in sections of all but three of the fifty titles of the United States Code.

[11]The anti-retaliation provision of the bill summarized by the Memorandum forbade retaliation by an employer "against any of his employees or applicants for employment." See 110 Cong. Rec. 7213 (Clark-Case Memorandum); *id.* at 8203 (reprinting § 705(a) of bill during subsequent debate that occurred prior to voting upon any proposed amendments to the bill).

Respondent does not argue that Congress wanted to leave former employees without federal protection from retaliation. But, respondent asserts, Congress chose to protect such individuals only from retaliation by new prospective employers, against whom they had never filed charges or testified, while permitting retaliation by the former employer against whom those charges or testimony was directed. Respondent offers no explanation as to why Congress would have chosen to place outside the prohibitions of § 704(a) the employer most likely to want to retaliate against the charging party, and the only employer who would benefit if coercive retaliation forced a former employee to withdraw a charge.

A recent Seventh Circuit decision regarding the scope of section 704(a) provides an additional text-based reason to construe the statute to apply to former employees. *Veprinsky v. Fluor Daniel, Inc.*, 87 F.3d 881 (7th Cir. 1996). As that opinion noted, section 704(a) prohibits retaliation inflicted because the victim "'opposed *any practice* made an unlawful employment practice by this subchapter'" or "'participated in *any* manner in an investigation, proceeding or hearing under this subchapter.'" *Id.* at 890 (emphasis added in part). In many of the most common types of employment discrimination, however, the individual affected would *not* be a current employee of the employer in question at the time he or she filed a charge or took part in a subsequent investigation or proceeding. If section 704(a) protected only current employees, that section — far from applying to "any" violation or "any" proceeding — would not apply to almost all charges of hiring discrimination, discriminatory dismissals, or discrimination in pensions or other post-employment benefits.

II. The Availability of State Remedies

Respondent advances two contradictory arguments regarding state laws[12] bearing on relations between employers and former employees. At pp. 25-30 of its brief, respondent contends that it is of no consequence whether section 704(a) applies to former employees because comparable protections for former employees are already provided by state law; on this view, application of section 704(a) would be unnecessary and duplicative. At pp. 37-39 of its brief, on the other hand, respondent argues that section 704 should not be applied to former employees because state law remedies for those workers are far narrower than section 704, and that applying section 704 would thus in some sense interfere with state law.[13] Obviously *both* of these arguments cannot be correct; we submit that neither is.

State defamation law, on which respondent principally relies (R. Br. 29), is in many respects inadequate to advance the prophylactic purposes of section 704. Defamation law would not forbid a variety of extremely effective retaliatory practices, such as (a) refusing to provide any references at all for charging parties, (b) refusing to include in references about charging parties any positive

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[12]The National Labor Relations Act does not, as respondent suggests, contain a general prohibition against blacklisting. Rather, that law forbids an employer only from refusing to hire an individual "to . . . discourage membership in any labor organization." 29 U.S.C. § 158(a)(3).

[13]Respondent may be asserting that, in those instances (*e.g.*, retaliation against a current employee) in which section 704(a) concededly does apply, its protections are excessive and "absurd," because state laws — although permitting forms of retaliation forbidden by section 704(a) — already provide "adequate" protection. Such a contention would be simply a disagreement with the decision of Congress to enact section 704(a) in the first place.

information, (c) placing in references regarding charging parties types of adverse or personal information that would not be included in references for any other former employees,[14] (d) including in a reference a truthful (albeit retaliation-based) statement that the former employer would not rehire, or recommend, the former employee. State defamation law cannot be fairly read to endorse, or protect, such abuses; these are simply problems that defamation law does not undertake to address. In any event, Title VII clearly does forbid an employer, regardless of state law, from taking such adverse actions on the basis of race or gender when providing recommendations regarding former or current employees, or from taking such actions, for retaliatory reasons, regarding recommendations concerning current employees. There is no reason to treat any differently retaliation-based adverse actions directed at former employees.

Any state law remedies that might apply to some types of retaliation would necessarily vary from one jurisdiction to another. Respondent argues, for example, that the caselaw-based "qualified privilege" for references could immunize an employer from being sued for a retaliatory adverse reference (R. Br. 38), while one amicus supporting respondent insists, to the contrary, that a retaliatory motive would eviscerate any such privilege.[15]

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[14]Where an employer's normal practice is to provide only laudatory information, or no information at all, about former employees, Title VII forbids an employer to single out former employees on the basis of race, or in retaliation for having filed a Title VII charge, and as to them alone dispense harmful — albeit accurate — information. *See McDonald v. Santa Fe Trail Transportation Co.*, 427 U.S. 273 (1976) (Title VII forbids employer to impose greater sanction on transgressing employee on account of his race).

[15]Brief *Amicus Curiae* of Washington Legal Foundation, at 15 n.7.

The scope of any such privilege might well turn on differences in state laws. Respondent also notes that eleven states have adopted special statues limiting defamation actions based on employer references; the terms of these statutes differ considerably,[16] and numerous other states do not have such laws.[17] It is difficult, moreover, to see how the existence of these state laws — the earliest of which was enacted in 1986 -- could control the interpretation of a federal civil rights law adopted several decades earlier.

While there might well be some instances in which retaliation forbidden by section 704 would also violate state law, this crazy-quilt of state statutes and caselaw is entirely inadequate to protect the viability of the Title VII charge process. At best the viability of that process would vary from state to state, a result flatly inconsistent with the need for a uniform national enforcement scheme. *See Patterson*

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[16]The California statute, for example, is limited to references provided with regard to applicants for law enforcement positions. CAL. GOV'T CODE § 1031.1 (West 1993). The Oklahoma law applies only to references provided with the employee's consent. OKLA. STAT. ANN. tit. 40, § 61 (West 1995). Several of these provisions are expressly inapplicable if the reference violated civil rights laws. ALASKA STAT. § 09.65.160 (1993); TENN. CODE ANN. § 50-1-105 (1995). Most but not all statutes deny immunity where the employer acted in bad faith or with a malicious purpose. ALASKA STAT. § 09.65.160 (1993); FLA. STAT. § 768.095 (1991); ME. REV. STAT. ANN. tit. 26, § 598 (West 1995); N.M. STAT. ANN. § 50-12-1 (Michie 1995); TENN. CODE ANN. § 50-1-105 (1995). Maryland recently enacted a law immunizing employers unless they act with actual malice or intentionally or recklessly disclose false information. 1996 Md. Laws 469 (May 14, 1996; effective October 1, 1996).

[17]Maryland law regarding interference with contracts would have no application in a case such as this, since it applies only where a contractual relationship has been created between the former employee and the new employer. *Bagwell v. Peninsula Regional Medical Center*, 665 A.2d 297, 313 (Md. App. 1995).

v. McLean Credit Union, 491 U.S. 164, 183 (1989). Frequently a former employee — even with the aid of skilled counsel — could not reliably glean from state law whether it would be safe to file an EEOC charge or to talk to an EEOC investigator. Ordinary charging parties, who are untutored in the law, and who do not enjoy the luxury of a personal attorney on retainer to give advice about issues such as state defamation law, could not know with any assurance whether it was prudent to file a complaint with, or give information to, the EEOC.

Even where substantive state law did forbid a particular retaliatory act, that would ordinarily be insufficient as a practical matter to safeguard the Title VII process. The value of section 704(a) to a current or former employee lies not only in its substantive scope, but also in the availability of the informal and inexpensive Title VII enforcement machinery to implement section 704(a) itself. A charging party who is the victim of retaliation forbidden by section 704(a) can seek legal protection merely by submitting a single-page handwritten charge to the nearest EEOC office; the EEOC is then responsible for investigating and seeking to resolve the problem, and the Commission can bring a civil action in its own name to end the abuse. In contrast, a charging party forced to rely on state law must retain a private attorney to bring a state civil action — a course of action far beyond the means of most charging parties, especially those who are out of work.[18] Any state law remedies would of course be unavailable to the EEOC itself; if former employees, in response to actual or threatened retaliation, refused to file charges, or to cooperate in EEOC

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[18]The remedies available in a state defamation action would often be inferior to the remedies provided by Title VII. Neither injunctions nor awards of counsel fees, two key elements of the relief authorized by section 706, are ordinarily available in a defamation action.

investigations, the Commission could not file suit to stop that retaliation, but would be relegated to pleading with the justifiably frightened former workers to hire private counsel and bring their own lawsuits against the employers at issue.

Respondent correctly observes that section 704(a), if it applied to retaliatory references intended to punish former employees, would forbid many practices that are not prohibited by state defamation law. Such differences, respondent asserts, would "conflict" with state law and lead to "absurd" results. Worse yet, applying section 704(a) to retaliatory references, respondent urges, would disturb the "balance" which the states have seen fit to draw between enforcing Title VII and protecting employees "against groundless claims of retaliation" (R. Br. 40). Respondent warns that "[d]isgruntled former employees could sue former employers over employment references even if . . . the employer has complied with state law" (R. Br. 10). But the proper "balance between employee and employer rights [is] struck by Title VII" itself. *Patterson v. McLean Credit Union*, 491 U.S. at 182 n.4. Section 704(a) clearly does permit a former employee to bring such suits — regardless of state law — if retaliatory references were issued before he or she was fired, or if an adverse reference was motivated by race or gender. As to actions brought by these former employees, Congress has clearly chosen to strike the balance in favor of safeguarding the Title VII administrative process. Respondent offers no reason why Congress, having done so with regard to workers retaliated against while still employed, would have left to the states the role of determining the degree of protection, if any, to be accorded to workers retaliated against after they were dismissed.

The ultimate answer to respondent's argument based on state law is found in Title VII itself. Section 708 provides that any state law that "purports to require or permit the doing of any act which would be an unlawful

employment practice under this title" is superceded. Thus, even if state law would permit an employer to issue a retaliatory letter of reference, Congress has already provided that such a law will not shield the employer from liability under Title VII.

III. The Workability of Applying Section 704 to Former Employees

Respondent suggests that it would be impracticable "to fashion equitable relief for a former employee" (R. Br. 31-32) But Title VII unquestionably does require courts to fashion remedies for former employees in a variety of circumstances. If, for example, an employer wrote a retaliatory adverse reference letter just *before* discharging an employee, that action would unquestionably be unlawful; respondent does not deny that courts could and would provide equitable and monetary relief in such a case, even though, by the time the court acted, the victim of the retaliation would have become a former employee. Thus here the remedy for the allegedly retaliatory reference letter of March 2, 1992 would be essentially the same as the remedy that would have been provided had the same letter been written on October 12, 1991, the day before petitioner was dismissed. Similarly, if respondent had sent an adverse post-dismissal reference letter because of petitioner's race, that would of course have been illegal, and petitioner would have been entitled to equitable and legal relief. Where a plaintiff has been injured by a retaliatory or race-based reference letter, the fashioning of relief is not made harder, or affected at all, by whether the victim was a current or former employee at the time the letter was written, or by whether the unlawful motive was retaliation or discrimination on the basis of race.

The remedial problems hypothesized by respondent are insubstantial.[19] Title VII does not contain a general prohibition against providing adverse information — truthful or otherwise — to a prospective employer. What Title VII does require is that an employer not make on certain prohibited bases — *e.g.*, race, gender, or the filing of a charge with EEOC — its decision whether to make adverse statements in a reference letter. Where an employer has acted with an impermissible motive, a court can and should forbid future violations of the law, and direct such corrective measures as are necessary to place the victim in the position which he or she would have occupied but for that violation of federal law. *Franks v. Bowman Trans. Co.*, 424 U.S. 747, 762-70 (1976). Congress entrusted the framing of particular injunctive decrees to the sound discretion of district judges. *Albemarle Paper Co. v. Moody*, 422 U.S. 405, 416-20 (1975).[20]

Respondent expresses concern that, if former employees were protected from retaliation, baseless retaliation claims might be filed regarding reference letters written decades after a worker had left the employ of a

[19]Respondent also expresses concern about what types of retaliatory actions by an employer against a former employee would be actionable (R. Br. 29 n.37, 32). But this affords no reason to deny protection to former employees; the kinds of retaliatory actions forbidden against former employees are the same kinds of actions which section 704(a) forbids against current employees.

[20]Standard provisions in settlements of Title VII discriminatory discharge cases deal with letters of references or responses to other inquiries from prospective employees. A neutral text is often agreed upon, discharges are changed to resignations, all telephonic inquiries are routed to a designated person, etc.

particular firm (R. Br. 32-33).[21] Actual experience, however, demonstrates that this does not occur; in the reported cases, as in the instant case, disputes regarding allegedly retaliatory reference letters typically arise within a matter of months after the plaintiff ceased working for the employer in question.[22] In any event, any problems posed by post-employment retaliation claims are not different in principle from other post-employment claims. Title VII indisputably provides protections against other practices that could occur long after a plaintiff has stopped working for an employer. Title VII would clearly be violated if, for example, an employer decided in 1996 to slash pension benefits for Roman Catholics who had retired in 1966. If respondent

[21]Respondent insists that the district judge's rejection of the merits of petitioner's dismissal claim demonstrates that petitioner's retaliation claim is baseless. Specifically, respondent argues that the trial judge who heard that dismissal claim necessarily found that all the adverse information in respondent's March 2, 1992, reference letter was "true" (R. Br. 6, 30, 39). There is, however, no decision by the district court regarding the contents of the letter. Indeed, there were neither an opinion nor any findings of fact following the trial of petitioner's discharge claim. Rather, the district judge after a bench trial merely entered a one sentence order stating that "judgment is entered in favor of Defendant, Shell Oil Company." *Robinson v. Shell Oil Co.*, Case No. JFM 93-20 (D. Md. April 15, 1994) (Judgment).

The mere fact that respondent prevailed at the trial of the discharge claim does not mean that the trier of fact accepted all, or even any, of respondent's proffered explanations for dismissing petitioner. If the trier of fact had concluded that the reasons proffered by the employer were fabrications — and that the adverse reference letter was a tissue of lies — the court was certainly authorized on that basis to find that petitioner's dismissal was racially motivated, but it was not required to do so. *St. Mary's Honor Center v. Hicks*, 509 U.S. 502, 511 (1993).

[22]*E.g.*, *Bailey v. USX Corp.*, 850 F. 2d 1506 (11th Cir. 1988) (employment ended August 29, 1984; adverse reference provided in April, 1985); *Polsby v. Chase*, *supra* note 9 (employment terminated July 9, 1985; adverse reference written on December 24, 1985).

were to adopt a policy of refusing to provide references for female former employees, a woman who had not worked for Shell since 1970 — but could not obtain a needed job reference in 1996 — clearly would be entitled to relief.

As a practical matter, however, any disputes about references from an employer of ten or twenty years earlier are exceedingly unlikely. Prospective employers are ordinarily interested in an applicant's record in positions held within the previous few years; former employers often will no longer have records regarding employees who left decades earlier. In the rare case in which a prospective employer sought, received and relied on adverse information regarding a job held by an applicant many years in the past, the applicant would be hard pressed to convince a trier of fact that the former employer still held a grudge after all the intervening years.

In our opening brief we suggested that the Fourth Circuit's interpretation of section 704(a) would permit employers to sabotage resort to the Title VII administrative process by victims of discrimination (P. Br. 23-30). Respondent maintains, however, that the critical purpose of the Title VII enforcement scheme is to "quickly resolve employment disputes" (R. Br. 32). Noting that section 706(e)(1) establishes a limitations period of 180-300 days, respondent reasons that the policy of avoiding protracted disputes would be advanced, *a fortiori*, if aggrieved individuals — in this case former employees subjected to retaliation — were precluded completely from seeking redress under Title VII for their injuries. In a somewhat Orwellian turn of phrase, respondent describes this proposed scheme — under which the number of days within which certain retaliation charges would have be filed is set at

zero[23] — as a "'statute of repose'" (R. Br. 33).

The central purpose of Title VII, however, was not to eliminate or shorten disputes between employers and employees, but to eradicate discrimination. There were many decades, to be sure, when the national and state governments resolutely protected employers from discrimination litigation by openly tolerating, if not encouraging, racist employment practices. At least since 1964, however, the federal government has chosen a different course, making the elimination of invidious discrimination "a policy that Congress considered of the highest priority." *Newman v. Piggie Park Enterprises*, 390 U.S. 400, 402 (1968).

Conclusion

Respondent suggests that limiting the protections of section 704(a) to current employees (and current applicants) would create only a minor and relatively unimportant limitation on the scope of that provision. In reality, such a limitation would go a long way toward eviscerating section 704(a), and with it the protections essential to the viability of the Title VII enforcement scheme.

Under the interpretation of section 704(a) advanced by respondent, that provision would not protect from employer retaliation victims of discriminatory dismissals (since they would be former employees by the time they filed Title VII charges), former applicants for employment who filed charges of discrimination in hiring (unless they had reapplied at the time of the retaliatory act), or victims of discrimination against former employees (e.g. pension discrimination). Former employee witnesses being questioned by EEOC — witnesses who might ordinarily be

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[23]In the instant case petitioner filed his Title VII charge eight days after the allegedly retaliatory letter.

more willing than current employees to provide candid information — could be openly threatened by employers under investigation by EEOC.

These categories of persons to be excluded from the protections of section 704 represent a substantial portion of all Title VII complainants. Many of the Title VII cases that have been considered by this Court involved claims of discrimination in dismissals, hiring or pensions. We set forth in the Appendix to this brief a list of 22 such decisions of this Court. In many sexual harassment cases plaintiffs only file charges with EEOC *after* they have stopped working for the employer at issue; Teresa Harris[24] and Mechelle Vinson[25] had both become former employees — and on respondent's view were thus subject to whatever forms of retaliation their former employers could devise — by the time they filed their Title VII charges.

For the above reasons, the decision of the Fourth Circuit should be reversed.

Respectfully submitted,

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[24] *Harris v. Forklift Sys., Inc.*, 410 U.S. ___, 114 S. Ct. 367 (1993). Harris resigned on October 1, 1987, as a result of the harassment, *id.* at 369, and filed her Title VII charge on October 10, see Joint Appendix at 10-11, *id.*

[25] *Meritor Savings Bank v. Vinson*, 477 U.S. 57 (1986). Vinson took indefinite sick leave in September, 1978, *id.* at 60, and in November of that year finally resigned and filed a charge with EEOC, see *Vinson v. Taylor*, 23 Fair Empl. Prac. Cas. 37 (D.D.C. 1980).

APPENDIX

APPENDIX

St. Mary's Honor Center v. Hicks, 509 U.S. 502 (1993)(discharge claim).

EEOC v. Arabian American Oil Co., 499 U.S. 244 (1991)(discharge claim); see 857 F. 2d 1014(5th Cir. 1988)(charge filed "after" dismissal).

Yellow Freight System, Inc. v. Donnelly, 494 U.S. 820 (1990)(hiring claim).

EEOC v. Commercial Office Products Co., 486 U.S. 107 (1988)(discharge claim).

Corporation of the Presiding Bishop v. Amos, 483 U.S. 327 (1987)(discharge claim).

Anderson v. City of Bessemer City, 470 U.S. 564 (1985)(hiring claim).

Crown, Cork & Seal Co. v. Parker, 462 U.S. 345 (1983)(discharge claim).

Ford Motor Co. v. EEOC, 458 U.S. 219 (1982)(hiring claim).

Kremer v. Chemical Construction Corp., 456 U.S. 461 (1982)(discharge and failure to rehire claim).

Texas Dept. of Community Affairs v. Burdine, 450 U.S. 248 (1981)(discharge claim).

New York City Transit Auth. v. Beazer, 440 U.S. 568 (1979)(hiring claims and discharge claims).

Furnco Construction Co. v. Waters, 438 U.S. 567 (1978)(hiring claim).

Dothard v. Rawlinson, 433 U.S. 321 (1977)(hiring claim).

Trans World Airlines, Inc. v. Hardison, 432 U.S. 63 (1977)(discharge claim).

International Union of Electrical Workers v. Robbins & Myers, Inc., 429 U.S. 229 (1976)(discharge claim).

Fitzpatrick v. Bitzer, 427 U.S. 445 (1976)(discrimination in retiree benefits).

McDonald v. Santa Fe Trail Transp. Co., 427 U.S. 273 (1976)(discharge claim)

Johnson v. Railway Express Agency, Inc., 421 U.S. 454 (1975)(discharge claim)(pending charge amended to add discharge claim following petitioner's dismissal).

Alexander v. Gardner-Denver Co., 415 U.S. 36 (1974)(discharge claim)(petitioner fired September 29, 1969; charge filed October 27, 1969).

Espinoza v. Farah Mfg. Co., 414 U.S. 86 (1973)(hiring claim).

McDonnell Douglas Corp. v. Green, 411 U.S. 792(1973)(hiring claim).

Phillips v. Martin Marietta Corp., 400 U.S. 542 (1971)(hiring claim).

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In the Supreme Court of the United States

OCTOBER TERM, 1995

CHARLES T. ROBINSON, SR., PETITIONER

v.

SHELL OIL COMPANY

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

BRIEF FOR THE UNITED STATES AND THE EQUAL EMPLOYMENT OPPORTUNITY COMMISSION AS AMICI CURIAE SUPPORTING PETITIONER

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Washington, D.C. 20507

QUESTION PRESENTED

Whether Section 704(a) of Title VII of the Civil Rights Act of 1964, 42 U.S.C. 2000e-3(a), which prohibits retaliation for filing a charge of discrimination, makes it unlawful for an employer to retaliate against an individual who has been fired by the employer and therefore no longer works for the employer at the time of the retaliatory act.

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In the Supreme Court of the United States

OCTOBER TERM, 1995

No. 95-1376

CHARLES T. ROBINSON, SR., PETITIONER

v.

SHELL OIL COMPANY

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

BRIEF FOR THE UNITED STATES AND THE EQUAL EMPLOYMENT OPPORTUNITY COMMISSION AS AMICI CURIAE SUPPORTING PETITIONER

INTEREST OF THE UNITED STATES AND THE EQUAL EMPLOYMENT OPPORTUNITY COMMISSION

The Attorney General and the Equal Employment Opportunity Commission (EEOC) share responsibility for enforcing Title VII of the Civil Rights Act of 1964, 42 U.S.C. 2000e *et seq.*, which prohibits discrimination in employment on the basis of race, sex, religion, or national origin, and also prohibits retaliation for filing a charge of discrimination. This case directly affects the enforcement responsibilities of the Attorney General and the EEOC. The EEOC

participated as amicus curiae in this case in the court of appeals.

STATEMENT

1. After petitioner was fired by respondent, he filed a charge with the EEOC, alleging that he was terminated because of his race, in violation of Title VII of the Civil Rights Act of 1964, 42 U.S.C. 2000e-2. He later applied for work with Metropolitan Life Insurance Company, which asked respondent for an employment reference about petitioner. Respondent gave Metropolitan Life a negative reference. Br. in Opp. 5.

Petitioner then filed a second charge with the EEOC, alleging that respondent gave the negative reference in retaliation for his having filed the charge of race discrimination. He also filed this action in district court, alleging that respondent violated the anti-retaliation provision of Title VII, 42 U.S.C. 2000e-3(a), by providing false information and negative job references to prospective employers in retaliation for his charge of race discrimination. Pet. App. A3-A4, A31-A32. The district court dismissed petitioner's claim (*id.* at A62-A63) on the authority of *Polsby* v. *Chase*, 970 F.2d 1360, 1365 (1992), in which the Fourth Circuit concluded that Title VII does not provide a former employee with a cause of action against his or her former employer for acts of retaliation allegedly committed after the employment relationship has ended. Shortly after the district court issued its decision, this Court vacated the court

of appeals' judgment in *Polsby*. *Polsby* v. *Shalala*, 507 U.S. 1048 (1993).[1]

2. a. A divided panel of the Fourth Circuit held that Title VII protects former employees from retaliation (Pet. App. A30-A61), but on rehearing en banc, the court of appeals ruled that it does not (*id.* at A1-A29). With regard to whether retaliation against former employees is prohibited by Title VII, the majority of the en banc court concluded that "the statutory language unambiguously answers the question 'no.'" *Id.* at A10.

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[1] *Polsby* was a Title VII action against the Department of Health and Human Services (HHS). The government did not argue that Title VII does not prohibit retaliation against former employees, but rather obtained dismissal of the case in the district court on the ground that the action was untimely. See 970 F.2d at 1364. The Fourth Circuit, after affirming the district court's ruling that the action was untimely, ruled *sua sponte* and in the alternative that Title VII does not prohibit employers from retaliating against former employees for filing discrimination charges. *Id.* at 1365. In response to Polsby's petition for a writ of certiorari, we informed the Court that we disagreed with the court of appeals' holding on the retaliation issue, but we did not suggest that the Court grant review on that issue. See 92-966 Gov't Br. at 9, *Polsby* v. *Shalala*, 507 U.S. 1048. We also informed the Court that we believed that there remained an issue of material fact on the timeliness question, such that summary judgment should not have been granted. 92-966 Gov't Br. at 9-11. The Court granted certiorari, vacated the judgment, and remanded for reconsideration "in light of the position asserted by the Acting Solicitor General." 507 U.S. at 1048. The court of appeals remanded the case to the district court, and the district court again dismissed the retaliation claim, in light of the en banc court of appeals' decision in this case. *Polsby* v. *Shalala*, 70 Fair Empl. Prac. Cas. (BNA) 800, 802 (D. Md. 1996).

The majority observed that Title VII makes it unlawful for an employer to retaliate against its "employees or applicants for employment," and defines "employee" to mean "an individual employed by an employer." Pet. App. A10-A11 (emphasis omitted). It further noted that Title VII does not expressly define "employee" to include an individual "no longer employed by an employer." *Id.* at A11. From those observations, it concluded that Title VII protects present employees and applicants for future employment, but not former employees, from retaliation. *Ibid.*

The majority rejected the suggestion that the definition of "employee" in Title VII is ambiguous. Since Title VII defines "employee" in terms of being "employed by an employer," the court looked to the definition of "employed" in *Black's Law Dictionary* (6th ed. 1990, at 525): "[p]erforming work under an employer-employee relationship." See Pet. App. A12. It found no basis for concluding that "employed" could mean "no longer performing work under an employer-employee relationship." *Ibid.*

Because it found the statutory language unambiguous, the court believed itself precluded from considering any other source of the statute's meaning unless "literal application of [the] statutory language would lead to an absurd result," or "would produce a result demonstrably at odds with the intent of Congress." Pet. App. A8, A12. The court concluded that it could not look to those "exceptions" to the plain meaning rule in this case because "both require Congress to have made [it] plain [elsewhere] that it intended a result different than literal application would produce." *Id.* at A13. It also believed that Congress's extension of protection from retaliation to *applicants*

for employment corroborated its reading of the statute. Since "applicants for employment" are "persons *distinct* from 'employees,'" the court said, Congress must have recognized the difference between "employees" and non-employees. See *ibid.*

The court cited "other important considerations" in reaching its conclusion that Title VII does not prohibit retaliation against former employees. Pet. App. A13-A14. First, "[t]he types of practices that Title VII forbids are particularly related to *employment*, *not* post-employment relationships." *Id.* at A14. Second, the framework for establishing a *prima facie* case of retaliation developed by the courts requires an "adverse employment action," which "necessarily entails conduct that occurs during the employment relationship." *Ibid.* And since "[a]dverse employment action necessarily requires that the adverse action taken by the employer must be in relation to its own act of *employing* the employee bringing the charge[,] * * * any adverse action taken after the employment has terminated cannot be actionable under Title VII." *Id.* at A15. "Given the types of practices that Title VII forbids, it follows that Congress drew the line defining the scope of Title VII at its most logical place—the termination of the employment relationship." *Ibid.*

b. Judge Hall filed a dissenting opinion, which was joined by Chief Judge Ervin and Judge Michael (Pet. App. A19-A28); Judge Murnaghan also dissented (*id.* at A29). Judge Hall noted that, under the majority's construction of the statute, an employee who was the subject of a retaliatory negative reference mailed on a Friday would have protection under Title VII, but an employee whose similar reference was mailed on the following Monday (after his last day of employment)

would not. *Id.* at A19-A20. He stated that the majority's construction of the statute will "inevitably lead to grossly absurd results; that those results are also plainly unintended can be readily understood by examining Congress's purpose in enacting Title VII." *Id.* at A21-A22.

Emphasizing that Title VII is "sweeping, remedial legislation" with a "detailed enforcement procedure," Judge Hall noted that "Congress understood that Title VII could only be enforced effectively if the persons most aggrieved by discriminatory practices could come forward without fear of retribution." Pet. App. A22-A23. "Unfortunately," he stated, "the majority's construction * * * will actively hinder [Title VII's] enforcement mechanism[,] * * * on two levels." *Id.* at A23. First, it will allow employers "to escape sanctions for behavior that is clearly unlawful." *Ibid.* Second, it will dissuade employees from bringing violations to the attention of the EEOC. *Id.* at A23-A24. "[N]o reasonable employee will come forward if there is any chance that his or her term of employment will soon end, thus giving the employer carte blanche to retaliate." *Id.* at A24.

Judge Hall also found the conclusion "inescapable" that "the term 'employees' is ambiguous." Pet. App. A27. He observed that the statute's definition of "employee"—as an "individual employed by an employer"—is "tautological." *Ibid.* He agreed that the root "employ" is often used to define "the current contractual relationship between a company and a designated worker," but he noted that "that is not its exclusive meaning"; for example, a recent retiree of a company may be referred to as its long-time "employee." *Id.* at A28 & n.9. Thus, he concluded, the

term "admits of more than one meaning," and is, "*ipso facto*, ambiguous." *Ibid.*

SUMMARY OF ARGUMENT

Title VII prohibits an employer from retaliating against an employee who has filed a discrimination charge, even if that employee has left the employer's service by the time the retaliatory act takes place. The court of appeals erred in concluding that the statute's use and definition of the term "employee" require confining Title VII's protection against retaliation to current employees. Title VII uses the word "employee" in several contexts to refer to former as well as current employees, and that meaning is within the common understanding of the term as well. This Court has also, on several occasions, used the term "employee" to include former employees, such as those seeking unemployment compensation, disability insurance, and old-age benefits.

Nor does the statutory definition of "employee" as a person "employed by an employer" counsel a different result. That definition merely confirms that Title VII incorporates common-law agency concepts in determining who is an employee (rather than an independent contractor). The term "employed" is consistent with past, completed employment as well as present employment.

A construction of the statute to protect employees from retaliation by their former employers best promotes the policy of the anti-retaliation provision, which is to ensure that employees are not discouraged from reporting discrimination to the EEOC and the courts. Title VII depends on employee initiative and cooperation with the EEOC to prevent discrimination in the workplace. If employers were able to

threaten employees who have resigned or been fired with retaliation for the filing of charges with the EEOC, employees would be chilled from taking action to report or oppose discrimination. The result would be especially perverse in the case of employees fired for discriminatory reasons; in such cases, the employer's violation of Title VII through a discriminatory discharge would give the employer freedom to retaliate against the discharged employee for complaining to the EEOC about the discrimination.

Construing Title VII to protect former employees against retaliation is fully consistent with the equitable nature of the remedies originally provided by Congress in Title VII, before compensatory and punitive damages were made available to victims of discrimination. An injunction against future violations provides valuable relief against such retaliation. Furthermore, the language of the anti-retaliation provision is not expressly limited to specific adverse actions that take place during the term of employment; it broadly prohibits any employer from discriminating against an employee because he or she has made a charge of discrimination. Nor does protection for former employees against retaliation conflict with the elements of a *prima facie* case for retaliation claims; those elements can easily be modified to cover post-employment retaliation.

ARGUMENT

TITLE VII PROHIBITS EMPLOYERS FROM RETALIATING AGAINST FORMER EMPLOYEES FOR FILING CHARGES OF EMPLOYMENT DISCRIMINATION

Section 704(a) of Title VII of the Civil Rights Act of 1964, 42 U.S.C. 2000e-3(a), provides:

> It shall be an unlawful employment practice for an employer to discriminate against any of his employees or applicants for employment * * * because he has made a charge, testified, assisted, or participated in any manner in an investigation, proceeding, or hearing [under Title VII].

It is not disputed in this case that the act of disseminating an adverse reference about an employee, if intended as retaliation for the employee's participation in a Title VII proceeding, violates Section 704(a). "There is little question that the dissemination of adverse employment references can constitute a violation of Title VII if motivated by [retaliatory] intent."[2] The only question in this case is whether that protection against retaliation is available to persons who are no longer employed by the employer at the time that the employer engages in such retaliation. In our view, it is.

1. a. The Court has emphasized on many occasions that the meaning of a statutory term must be

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[2] *London* v. *Coopers & Lybrand*, 644 F.2d 811, 817 (9th Cir. 1981) (relying on Title VII case law to find violation under 42 U.S.C. 1981). See *Pantchenko* v. *C.B. Dolge Co.*, 581 F.2d 1052, 1055 (2d Cir. 1978); *Sparrow* v. *Piedmont Health Sys. Agency*, 593 F. Supp. 1107, 1118-1119 (M.D.N.C. 1984); *Czarnowski* v. *Desoto, Inc.*, 518 F. Supp. 1252, 1257, 1259 (N.D. Ill. 1981); see also *Rutherford* v. *American Bank of Commerce*, 565 F.2d 1162, 1164 (10th Cir. 1977) (informing prospective employer that employee filed charge with EEOC violates Title VII); *Passer* v. *American Chem. Soc'y*, 935 F.2d 322, 331 (D.C. Cir. 1991) (adverse reference may constitute unlawful retaliation under Age Discrimination in Employment Act of 1967); cf. *Shehadeh* v. *Chesapeake & Potomac Tel. Co.*, 595 F.2d 711, 722-723 (D.C. Cir. 1978) (adverse employment reference violates Title VII when motivated by animus based on sex and national origin).

determined with reference to the particular context in which it appears. See *United States* v. *American Trucking Ass'ns*, 310 U.S. 534, 542 (1940); *Shell Oil Co.* v. *Iowa Dep't of Revenue*, 488 U.S. 19, 24-25 (1988); *King* v. *St. Vincent's Hospital*, 502 U.S. 215, 221 (1991). In many Title VII contexts, the word "employee" includes former employees. Most prominently, Section 706(g)(1) of Title VII, 42 U.S.C. 2000e-5(g)(1), provides that, if a court finds that an employer has engaged in an unlawful employment practice, the court may order "*reinstatement* or hiring *of employees*." (Emphasis added.) Similarly, when Congress extended Title VII in 1972 to cover the federal government, it required the EEOC to provide for appropriate remedies against employment discrimination in the federal government, "including reinstatement or hiring of employees." 42 U.S.C. 2000e-16(b). In those contexts, the term "employees" clearly includes former employees.

The 1972 amendments to Title VII contain other provisions plainly including former employees within the term "employee." Thus, if a person files a complaint with a federal agency claiming to have been the victim of employment discrimination, agency regulations must ensure that the "employee or applicant for employment shall be notified of any final action taken on any complaint of discrimination." 42 U.S.C. 2000e-16(b). If "employee" did not include former employees, persons terminated from federal employment who claimed discrimination in that termination would not be entitled to the required notice. The statute further provides that "an employee or applicant for employment," if aggrieved by the final decision of the agency or the EEOC on his discrimination complaint, may file a civil action within 90 days

of the final administrative action. 42 U.S.C. 2000e-16(c). Former employees must come within that provision as well; otherwise, employees who have been fired for discriminatory reasons would have no cause of action and would not be covered by the statute of limitations.

On the other hand, not all references to "employees" in Title VII include former employees. Title VII defines "employer" as a person engaged in an industry affecting commerce "who has fifteen or more employees for each working day" during specified periods. 42 U.S.C. 2000e(b). In that context, it is clear that "employer" status is to be determined by counting only the number of persons on the employer's payroll on particular days; former employees are not to be included. Thus, contrary to the court of appeals' conclusion that the word "employee" necessarily has the same meaning every time that it appears in Title VII (Pet. App. A7), the meaning of that term in Title VII depends on the context in which it appears.[2]

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[3] Indeed, some provisions of Title VII even exclude current employees from the reach of the term "employee." The statute's definition of "employment agency," for example, defines it to mean "any person regularly undertaking * * * to procure for employees opportunities to work for an employer." 42 U.S.C. 2000e(c). In a related provision, the statute provides that a labor organization is engaged in an industry affecting commerce (and therefore covered by Title VII) if it operates a hiring hall that "procures for employees opportunities to work for an employer." 42 U.S.C. 2000e(e). In both contexts, the statute uses "employee" to refer to persons in search of a future employment relationship, and not persons currently performing work for an employer.

b. Use of the word "employee" to refer to a former employee is consistent with the common use of the term.[4] One might say, for example, that "the fire at the plant was set by a disgruntled employee" when referring to an employee who had recently been fired. One might also refer to a person just retired from service as a "30-year employee of the federal government." In neither case would the use of the word "employee" be awkward or strained.

This Court has on several occasions used the word "employee" to refer to a former employee. For example, the Court has referred to discharged workers seeking unemployment compensation as "employees." See, *e.g.*, *Hobbie* v. *Unemployment Appeals Comm'n*, 480 U.S. 136, 142 (1987); *California Human Resources Dep't* v. *Java*, 402 U.S. 121, 134 (1971); *Nash* v. *Florida Industrial Comm'n*, 389 U.S. 235, 239 (1968). Similarly, in a case involving disability insurance, the Court referred to persons no longer able to

[4] See *Pantchenko*, 581 F.2d at 1055. The court of appeals in the present case believed that the statutory protection for "employees" against retaliation could cover only current employees because Title VII separately and specifically protects *applicants* for employment. Pet. App. A13. It reasoned that Congress had extended Title VII beyond the actual employment relationship to cover potential *future* employees, but not *past* employees. It concluded that, "[i]f Congress intended Title VII to remedy discrimination [after] the employment relationship, then it could have easily done so by including 'former employee' when defining 'employee.'" *Id.* at A11. But, unlike a former employee, an *applicant* for employment may not be within the common understanding of the meaning of "employee." Congress may therefore have extended Title VII's protection against retaliation to "applicants" in order to make clear that applicants are, in fact, protected.

work and no longer employed (and therefore entitled to receive disability coverage) as "disabled employees." *Richardson* v. *Belcher*, 404 U.S. 78, 81 (1971); see also *Geduldig* v. *Aiello*, 417 U.S. 484, 494 (1974) (referring to compensation for "employee disability"). And it has also referred to a retired worker who had become eligible to receive old-age benefits under the Social Security Act as a "covered employee under the Act." *Flemming* v. *Nestor*, 363 U.S. 603, 611 (1960).

That is not to say that every statutory reference to "employees" includes all former employees; context may require a more limited construction. For example, in *Allied Chemical & Alkali Workers of America* v. *Pittsburgh Plate Glass Co.*, 404 U.S. 157 (1971), the Court concluded that the National Labor Relations Act (NLRA) does not make the health benefits of retired employees a mandatory subject of collective bargaining, and it noted that, in that context, "employees" does not include retired workers because "retired employees have ceased to work for another for hire." *Id.* at 168. At the same time, the Court noted that "employees" might include "persons who have quit or whose employers have gone out of business," since they are "members of the active work force available for hire and at least in that sense could be identified as 'employees.'" *Ibid.*[5]

[5] Some federal statutes refer even to retired employees as "employees." For example (as the *Allied Chemical Workers* Court acknowledged), Section 302(c)(5) of the Labor Management Relations Act, 29 U.S.C. 186(c)(5), prohibits payments by an employer to any representative of his employees, but permits employer payments to a trust fund established for the sole benefit of "the employees of such employer." That exemption permits the employer to make payments to the fund for the

2. The court of appeals nevertheless believed that its construction of "employee" was compelled by the statutory definition of "employee" as "an individual employed by an employer." See 42 U.S.C. 2000e(f). The court also looked to a dictionary definition of "employed," and found it as meaning "performing work under an employer-employee relationship." See Pet. App. A12. Because the dictionary definition of "employed" uses a present participle, the court reasoned that "employee" could mean only a person *presently* performing work under an employer-employee relationship. *Ibid.*

The court of appeals misapprehended the purpose of the statutory definition of "employee." As originally enacted, Title VII provided that "[t]he term 'employee' means an individual employed by an employer."[6] This Court has remarked of the same phrase in ERISA's definition of "employee" that the definition "is completely circular and explains nothing." *Nationwide Mutual Ins. Co.* v. *Darden*, 503 U.S. 318, 323 (1992). To the extent that the definition has any significance, it confirms that Congress intended the statute to cover only employment under "the conventional master-servant relationship as

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benefit of retired employees. See 404 U.S. at 169. Similarly, the Employee Retirement Income Security Act of 1974 (which, as its name shows, is directed principally at benefits payable and paid to former employees), defines an "employee pension benefit plan," the focus of that Act, as a plan that "provides retirement income to employees." 29 U.S.C. 1002(2)(A).

[6] See Civil Rights Act of 1964, Pub. L. No. 88-352, § 701(f), 78 Stat. 255. The definition of "employee" has since been amended to exclude certain employees of state and local governments, and to include United States citizens employed outside the United States. See 42 U.S.C. 2000e(f).

understood by common-law agency doctrine," rather than more expansive concepts that would traditionally have been viewed as falling within an independent contractor relationship. See *id.* at 322-324; cf. *Community For Creative Non-Violence* v. *Reid*, 490 U.S. 730, 739-740 (1989). Thus, the definition of "employee" indicates that Title VII protects employees from discrimination by those with whom they have or had an *employment* relationship, and does not address discrimination in other forms of contracting.

The statutory definition of "employee" as an individual "employed by an employer" is also grammatically consistent with both present and past employment. As leading commentators on language have explained, the third form of a verb (such as "employed") can refer to either a *past* action or a *passive* action, and "the form itself does not express time." See Bergen Evans & Cornelia Evans, *A Dictionary of Contemporary American Usage* 353 (1957) (Evans & Evans). An "individual employed by an employer" can, logically and linguistically, refer both to a person currently employed by an employer and to one previously so employed.

The same is true of the dictionary definition of "employed" that the court of appeals consulted. That source defines "employed" to mean, among other things, "[p]erforming work under an employer-employee relationship." *Black's Law Dictionary* 525 (6th ed. 1990). The court of appeals evidently believed that "performing" work could be understood only as referring to activity in the present tense, but that is incorrect. The present or active participle form "does not show time and is used in past tense phrases as well as in present." Evans & Evans, *supra*, at 353.

3. The plain language of Title VII, therefore, presents no obstacle to a construction of "employee" to include former employees of an employer. At a minimum, the language of the statute is ambiguous on the point. And in construing a statute, the Court should adopt that sense of its words which best promotes the policy and objectives of the legislature. *St. Vincent's Hospital*, 502 U.S. at 221; *Crandon* v. *United States*, 494 U.S. 152, 158 (1990). In the present situation, a construction of the statute to protect former employees from retaliation by employers for participating in Title VII proceedings is necessary to advance the objectives of the statute. The contrary interpretation offered by the court of appeals, on the other hand, would seriously impair the statute's effectiveness.

Strong protection from retaliation toward employees who complain to, or cooperate with, the EEOC is essential to the effectiveness of Title VII, as well as other federal statutes that prohibit retaliation against employees.[7] As the Court noted in construing

[7] The Age Discrimination in Employment Act of 1967 prohibits retaliation against "employees" who file charges, 29 U.S.C. 623(d), as do the Fair Labor Standards Act of 1938, 29 U.S.C. 215(a)(3), the National Labor Relations Act, 29 U.S.C. 158(a)(4), and the Occupational Safety and Health Act of 1970, 29 U.S.C. 660(c). There are also prohibitions on retaliation against "employees" in the Longshore and Harbor Workers' Compensation Act, 33 U.S.C. 948a, the Employee Polygraph Protection Act of 1988, 29 U.S.C. 2002(4), and several whistleblower protection statutes, see 42 U.S.C. 5851; 42 U.S.C. 7622; 42 U.S.C. 300j-9(i); 42 U.S.C. 6971; 42 U.S.C. 9610; and 33 U.S.C. 1367. In addition, Executive Order No. 11,246, as amended by Executive Order No. 11,375, prohibits government contractors from discriminating against any "employee or applicant for employment because of race, color, religion, sex, or national origin"; the Department of Labor has issued a regulation based on that Order that prohibits acts intended to interfere with an employee's right to file a discrimination complaint or otherwise cooperate with the government. 41 C.F.R. 60-1.32.

the anti-retaliation provision of the NLRA, "'Congress has made it clear that it wishes all persons with information about [prohibited practices] to be completely free from coercion against reporting them to the [authorities.]' * * * This complete freedom is necessary * * * 'to prevent the [government's] channels of information from being dried up by employer intimidation of prospective complainants and witnesses.'" *NLRB* v. *Scrivener*, 405 U.S. 117, 121-122 (1972). The Court has recognized that the same is true of the anti-retaliation provision of the Fair Labor Standards Act of 1938 (FLSA):

> For weighty practical and other reasons, Congress did not seek to secure compliance with prescribed standards through continuing detailed federal supervision or inspection of payrolls. Rather it chose to rely on information and complaints received from employees seeking to vindicate rights claimed to have been denied. Plainly, effective enforcement could thus only be expected if employees felt free to approach officials with their grievances. This end the prohibition * * * against discharges and other discriminatory practices was designed to serve. For it needs no argument to show that fear of economic retaliation might often operate to induce aggrieved employees quietly to accept substandard conditions. * * * Congress sought to foster a

climate in which compliance with the substantive provisions of the Act would be enhanced.

Mitchell v. *DeMario Jewelry, Inc.*, 361 U.S. 288, 292 (1960).

The EEOC's enforcement of Title VII is equally dependent on cooperation by employees (as both complainants and witnesses).[8] That cooperation could be severely chilled without broad protection from retaliation. As with the NLRA and the FLSA, Title VII is enforced through the initiative of individuals' complaints to the agency and the courts, rather than detailed federal supervision of the workplace. Congress therefore prohibited retaliation "in clear, absolute terms."[9] Congress recognized that retaliation "is likely to cause irreparable harm to the public interest in enforcing the law by deterring others from filing charges." *Garcia* v. *Lawn*, 805 F.2d 1400, 1405 (9th Cir. 1986). Retaliation also "carries with it the distinct risk that other employees may be deterred from * * * providing testimony for the plaintiff in her effort to protect her own rights." *Holt* v. *Continental Group, Inc.*, 708 F.2d 87, 91 (2d Cir. 1983), cert. denied, 465 U.S. 1030, 1038 (1984).

An employee's need for protection against retaliation by a former employer does not end when the employee resigns or is fired. A threat of post-employment retaliation could seriously chill victims

[8] See *EEOC* v. *Board of Governors*, 957 F.2d 424, 431 (7th Cir.), cert. denied, 506 U.S. 906 (1992); *EEOC* v. *Cosmair, Inc.*, 821 F.2d 1085, 1090 (5th Cir. 1987); *Parker* v. *Baltimore & O.R.R.*, 652 F.2d 1012, 1019 (D.C. Cir. 1981); *Pettway* v. *American Cast Iron Pipe Co.*, 411 F.2d 998, 1005 (5th Cir. 1969).

[9] *Parker*, 652 F.2d at 1019.

of, or witnesses to, discrimination from complaining to the EEOC or cooperating with EEOC investigations. It is, moreover, particularly important for employees to have protection against retaliation in the form of the dissemination of adverse employment references.[10] Almost every employee will, at some point, need a reference from a former employer; "it is a fact of business life" that employers require prospective employees to provide references from former employers. See *Hodgson* v. *Charles Martin Inspectors of Petroleum, Inc.*, 459 F.2d 303, 306 (5th Cir. 1972). Employees understand that "post-employment blacklisting is sometimes more damaging than on-the-job discrimination because an employee subject to discrimination on the job will often continue to receive a paycheck while a former employee subject to retaliation may be prevented from

[10] Although this case involves adverse employment references, the lower courts have recognized that post-employment retaliation for filing a discrimination charge can take many forms, all of which can seriously chill employees' willingness to complain to or cooperate with the EEOC, and can therefore impair the EEOC's ability to investigate and prevent discrimination. See *Berry* v. *Stevinson Chevrolet*, 74 F.3d 980, 985 (10th Cir. 1996) (institution of criminal charges as retaliation for filing race discrimination complaint); *Passer*, 935 F.2d at 331 (cancellation of symposium in honor of retired employee because he filed complaint of age discrimination); *Beckham* v. *Grand Affair*, 671 F. Supp. 415, 419 (W.D.N.C. 1987) (allegation that employer caused former employee to be arrested and prosecuted). The EEOC has also concluded that the unwarranted contesting of an unemployment compensation claim in retaliation for filing a discrimination charge constitutes unlawful retaliation under Title VII. See EEOC Compl. Man. § 614.7(f) (CCH) at 3136 (May, 1988) (discussing EEOC Decision No. 72-0139 (1972)).

obtaining any work in the trade or occupation previously pursued." *Charlton* v. *Paramus Board of Educ.*, 25 F.3d 194, 200 (3d Cir. 1994). Employees' need for references therefore makes them highly vulnerable to intimidation by employers into remaining silent about discrimination in the workplace—exactly the danger to which the anti-retaliation provision of Title VII is addressed. An employee who has reason to fear that a current employer will retaliate in the future because of complaints about discrimination, cooperation with the EEOC, or court testimony is likely to remain silent rather than run the risk of being "blacklisted."

Under the court of appeals' rule, an employer could deter its employees from filing discrimination charges, cooperating with the EEOC, or testifying in court by making it known that any employee who did so would be blacklisted, or suffer some other serious adverse consequence, after he or she left the company and then needed another job. Faced with that prospect, an employee who believed that he or she had been the victim of discrimination (or had observed discrimination at the workplace) might easily be intimidated into suffering the employer's discrimination in silence. Employees could be deterred from filing discrimination charges even after resigning because of discriminatory conditions, since the act of filing such a charge would carry the implicit cost of enabling their former employers to report them to prospective employers as troublemakers.

The court of appeals' rule also creates incentives for perverse and counterproductive behavior. On the one hand, it may actually encourage employers with a discriminatory animus to fire the victims of that bias, since those fired employees, unlike current ones,

could be retaliated against without statutory limitation. On the other hand, it may lead employees suffering from discrimination to hang on at all costs to employment with a discriminatory employer rather than seek another position, since protection against retaliation would disappear as soon as they left the company. See Pet. App. A23-A24 (Hall, J., dissenting). The purpose of the anti-discrimination provision of Title VII, however, is to ensure that the filing of charges does not affect employment decisions in any way; an employee should be free to leave or stay, without fear that he or she will suffer for having filed an employment discrimination charge.

As Judge Hall pointed out (Pet. App. A19-A20), the court of appeals' rule also leads to arbitrary distinctions among fact patterns that should be treated similarly. Assume, for example, that two current employees both file discrimination charges with the EEOC and both explore employment possibilities with other companies, who request references from their current employer. Assume further that the employer reacts by mailing false, adverse employment references, and that both employees decide to leave the company rather than endure further discrimination. If the adverse employment reference as to one of the employees is mailed out on the day after that employee leaves, that employee will not have an action against the employer for retaliation under the court of appeals' rule, while the other employee will have such an action, if her reference is mailed the day before she leaves the company. *Ibid.* There is no basis in Title VII for treating those situations differently.

4. Respondent and the court of appeals have advanced several other reasons based on the

structure of the statute to suggest that Title VII does not prohibit retaliation against former employees. First, respondent points out that Title VII, as originally enacted, provided only equitable relief for violations. It then suggests (Br. in Opp. 14) that it would be difficult to fashion an equitable remedy for retaliation against a former employee. That suggestion is incorrect; an injunction against future violations of the statute could be quite valuable to an employee who has suffered retaliation. An employee who was being blacklisted by a former employer might well seek an injunction against that employer to prevent further dissemination of the adverse reference, even if he or she could not prove or obtain compensatory damages resulting from the violation.[11]

Second, the court of appeals suggested that Title VII could not be construed to protect former employees against retaliation because "[t]he types of practices" prohibited by Title VII "are particularly related to *employment*, *not* post-employment relationships." Pet. App. A14. Referring to the definition of "an unlawful employment practice" in Section 703(a) of Title VII, 42 U.S.C. 2000e-2(a)(1), the court concluded that "[t]his definition comprises discrimination with respect to certain aspects of employment, and does not redress discriminatory practices *after* the employment relationship has terminated." Pet. App. A14.

That analysis reflects a misunderstanding of Title VII in several respects. It overlooks important differences between Section 703 and Section 704 of Title

[11] Federal law now provides for compensatory and punitive damages against an employer who engages in unlawful retaliation in violation of Title VII. See 42 U.S.C. 1981a(a)(1).

VII. Section 703(a) declares it to be an "unlawful employment practice" to violate Title VII's substantive prohibition against discrimination with respect to certain specified actions by employers, all of which are related to employment.[12] Section 704(a) provides that it shall *also* be an "unlawful employment practice" to discriminate against a covered individual "because he has made a charge" under Title VII. Violations of Section 704(a) are not limited to the "unlawful employment practice[s]" listed in Section 703(a). Rather, Section 704(a) "speaks unconditionally, without limitation to acts causing particular harms such as the loss of a particular job or promotion." *Smith* v. *Secretary of the Navy*, 659 F.2d 1113, 1119 n.56 (D.C. Cir. 1981); see also *Passer* v. *American Chem. Soc'y*, 935 F.2d 322, 331 (D.C. Cir. 1991).

The unconditional nature of Section 704(a) reflects its broad purpose of ensuring the effectiveness of the prohibitions on employment discrimination. Acts of retaliation motivated to punish employees for filing discrimination charges threaten to impair the effectiveness of the administrative machinery for investigating, punishing, and deterring violations of Title VII. The threat of retaliation is likely to chill employees' willingness to file charges and to cooperate with the EEOC in investigating discrimi-

[12] Section 703(a) provides that it is unlawful for an employer "to fail or refuse to hire or to discharge any individual, or otherwise to discriminate against any individual with respect to his compensation, terms, conditions, or privileges of employment, because of such individual's race, color, religion, sex, or national origin." 42 U.S.C. 2000e-2(a).

nation, even if that retaliation occurs after the employee has resigned.

Moreover, while the main focus of Section 703(a) is indeed on the ongoing employment relationship, the court of appeals was incorrect in its apprehension that Section 703(a) prohibits only discrimination that is completed during the term of employment. "Pension benefits, for example, qualify as terms, conditions, or privileges of employment even though they are received only after employment terminates," *Hishon* v. *King & Spalding*, 467 U.S. 69, 77 (1984), and yet no one would suggest that Title VII permits an employer to discriminate on the basis of race in paying out pensions. See *Arizona Governing Committee* v. *Norris*, 463 U.S. 1073, 1081-1082 (1983). The same is true of employment references. It is entirely reasonable to consider post-employment references to be a term, condition, or privilege of employment, since it is routine for employees to request them of their past employers and for employers to provide them.

Finally, the court of appeals suggested (Pet. App. A14-A15) that Title VII does not address post-employment retaliation because "the second element of a *prima facie* case of retaliation under Title VII requires the employee to suffer an 'adverse employment action' that necessarily entails conduct that occurs during the employment relationship." That basis for its conclusion is particularly unpersuasive. The *prima facie* case established for Title VII cases is not an element of the statute, but is a judicially created "allocation of the burden of production and an order for the presentation of proof." *St. Mary's Honor Center* v. *Hicks*, 509 U.S. 502, 506 (1993). If the *prima facie* case for retaliation claims generally requires proof of an adverse employment action, that

is because retaliation frequently takes the form of adverse employment actions against current employees.[13] The requirements of a *prima facie* case in a Title VII action are not "rigid, mechanized, or ritualistic," however (see *Texas Dep't of Community Affairs* v. *Burdine*, 450 U.S. 248, 253 n.6 (1981)), and the elements of a *prima facie* case of retaliation can be readily modified to include adverse actions taken after the employment relationship has ended.[14]

CONCLUSION

The judgment of the court of appeals should be reversed, and the case remanded for further proceedings.

Respectfully submitted.

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[13] See, *e.g.*, *Ross* v. *Communications Satellite Corp.*, 759 F.2d 355, 365 (4th Cir. 1985); *Burrus* v. *United Tel. Co.*, 683 F.2d 339, 343 (10th Cir.), cert. denied, 459 U.S. 1071 (1982); *Grant* v. *Bethlehem Steel Corp.*, 622 F.2d 43, 46 (2d Cir. 1980).

[14] See, *e.g.*, *Passer*, 935 F.2d at 331; *Berry*, 74 F.3d at 985.

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No. 95-1376

In the
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October Term, 1995

Charles T. Robinson,

Petitioner,

v.

Shell Oil Co.,

Respondent.

ON PETITION FOR A WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

BRIEF *AMICUS CURIAE* OF NATIONAL EMPLOYMENT LAWYERS ASSOCIATION IN SUPPORT OF PETITIONER

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QUESTION PRESENTED

Does the term "employees" in Section 704(a) of Title VII of the Civil Rights Act of 1964, making it unlawful for an employer to discriminate against any of its employees or applicants for employment because they have availed themselves of Title VII's protections, include former employees?

LIST OF PARTIES

1. Charles T. Robinson, Petitioner.

2. Shell Oil Company, Respondent.

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BRIEF *AMICUS CURIAE* OF NATIONAL EMPLOYMENT LAWYERS ASSOCIATION IN SUPPORT OF PETITIONER

OPINION BELOW

The opinion of the United States Court of Appeals for the Fourth Circuit is reported at 70 F.3d 325 (4th Cir. 1995) (en banc).

JURISDICTION

The United States Court of Appeals for the Fourth Circuit issued its opinion and judgment on November 29, 1995. The petitioner invoked the jurisdiction of this Court under 28 U.S.C. §1254(1).

STATUTES AND CONSTITUTIONAL PROVISIONS INVOLVED

Title VII of the Civil Rights Act of 1964, specifically §701(f), 42 U.S.C. §2000e(b), §703(a)(1), 42 U.S.C. §2000e-2(a)(1), and §704(a), 42 U.S.C. §2000e-3(a).

Interest of *Amicus Curiae* and Summary of Argument

The National Employment Lawyers Association (NELA) is a voluntary membership organization of over 2,000 lawyers who represent employees in labor, employment and civil rights disputes. NELA is one of the largest organizations in the Unted States whose members litigate and counsel individuals, employees and applicants on claims arising out of the workplace.

As part of its advocacy efforts, NELA has filed numerous *amicus curiae* briefs before this Court, singly or jointly with other amici. Some of the more recent cases are ***O'Connor v. Consolidated Coin Caterers Corp.***, 116 S.Ct. 1307(1996); ***Harris v. Forklift Systems, Inc.***, 510 U.S. 17 (1993); ***McKennon v. Nashville Banner Co.***, 115 S.Ct. 879 (1995); and ***Hazen Paper Co. v. Biggens***, 508 U.S. 948 (1993).

NELA has an interest in the issue raised in this appeal because a substantial number of the cases in which its

members are involved arise under federal statutory provisions whose protections are extended to "employees" and "applicants."

NELA concurs with the conclusion of the petitioner that "former employees" are protected from post-employment reprisal by §704(a) of Title VII. In this brief, NELA advances the argument that former employees are protected by Title VII when their claim of retaliation is based on the denial of privilege of employment that the employer confers on its workers. Thus, under the reasoning of ***Hishon v. King & Spaulding***, 467 U.S. 69 (1984), which broadly construed the term "privileges of employment" in section 703(a)(1), 42 U.S.C. §2000e-2(a)(1), employment references are benefits that employers such as Shell Oil make an incident of employment and that is part and parcel of the employment relationship, and cannot be abused in reprisal for the ex-employee's engagement in statutorily-protected activities.

The position NELA takes in the following brief has not been approved or financed by petitioner or his counsel.

The written consents of both parties have been filed with the Clerk of the Court pursuant to Supreme Court Rule 37.3.

STATEMENT OF CASE

After working for Shell Oil Company for a dozen years, Charles T. Robinson was dismissed in 1991. He promptly filed a charge of discrimination with the Equal Employment Opportunity Commission. Fulfilling his duty to mitigate, Robinson sought other employment, listing Shell on his applications. He applied at a company which contacted Shell for a reference. Shell responded negatively, which precipitated a second charge by Robinson, this one alleging that his former employer gave a negative reference in retribution for his first charge.

He eventually filed suit in federal district court under Title VII, alleging that Shell had violated the anti-reprisal provisions of Title VII when it gave a negative job reference about him to a prospective employer.

ARGUMENT

Former Employees Are Protected From Reprisal Under Title VII When Their Claim of Reprisal Involves the Denial of A 'Privilege of Employment' That The Employer Confers On Employees Even Though Not Contractually Bound To Do So.

A. A Literal Interpretation of 'Employee' 'Leaps Over the Boundaries of Common Sense.'

"The best way of answering a bad argument is not to stop it," the nineteenth century essayist Sydney Smith instructs us," but to let it go on in its course till it leaps over the boundaries of common sense." Sydney Smith, *Spring Guns and Man Traps*, in ***Selected Writings of Sydney Smith*** 236 (W.H. Auden ed., 1956). The Fourth Circuit held that term "employee'" in Section 704(a) of Title VII of the Civil Rights Act of 1964 is crystal clear and does not encompass former employees. ***Robinson v. Shell Oil Co.***, 70 F.3d 325 (4th Cir. 1995). Let us let the literalist interpretation of Section 704 "go on in its course" and see what happens.

The literalist interpretation of Section 704 precludes statutory protection of a person who is observed walking out of the EEOC offices during a lunch break or after work by a supervisor who believes she has just filed a charge of discrimination and fires her on the spot. That individual is not *literally* working for the employer at that very moment and is not protected by a *literal* interpretation of the word "employee" in Section 704. With such a pinched construction, the results inevitably will be unjust, unreasonable, and contrary to the broad purpose of the legislation.

We need not belabor the point. Using Syndey Smith's elegant phrase, the literalist interpretation of "employee" in

Section 704 "leaps over the boundaries of common sense."

Now let us turn to reality. The reality is that over a decade ago this Court recognized that employees -- and by implication ex-employees -- are entitled to receive, without discrimination, certain benefits and privileges of their work that do not accrue or become available for use and enjoyment until after the conclusion of their employment. ***Hishon v. King & Spaulding***, 467 U.S. 69 (1984).

B. A Benefit an Employer Confers on Its Workers That Becomes Due Only After the Employment Relationship Ends is a 'Privilege of Employment' Protected by Title VII.

Section 703(a)(1) of Title VII, 42 U.S.C. §2000e-2(a)(1), prohibits discrimination with respect to the "terms, conditions, or privileges of employment" on the basis of "race, color, religion, sex, or national origin." This Court broadly defined the phrase "terms, conditions, or privileges of employment" in ***Hishon v. King & Spaulding***, 467 U.S. 69 (1984), where a female attorney alleged that her rejection for promotion to partnership of a law firm violated Title VII. The lower courts dismissed her complaint on the ground that Title VII was inapplicable to the selection of partners by a partnership, but this Court reversed, holding that she stated a claim for relief under Title VII.

Hishon enunciated two views of the phrase "term, condition or privilege of employment." First, if consideration for partnership was an explicit provision of the associate lawyer's employment contract with the law firm, then it was a "term" or "condition" of employment that the firm was required to provide without regard to her sex. 467 U.S. at 74-75. Second, and most important for the present appeal, ***Hishon*** held that even if the law firm was not contractually obligated to consider the plaintiff for partnership, such a

consideration was a "privilege" of employment under Section 703(a)(1) if her chance or opportunity to become a partner was one of the benefits the law firm regularly granted its associate lawyers. Recognizing the realities of the employment relationship, the Court stated:

> An employer may provide its employees with many benefits that it is under no obligation to furnish by any express or implied contract. Such a benefit, though not a contractual *right* of employment may qualify as a "privileg[e]" of employment under Title VII. A benefit that is part and parcel of the employment relationship may not be doled out in a discriminatory fashion, even if the employer would be free under the employment contract simply not to provide the benefit at all.

Id. at 75. ***Hishon***, in rejecting the employer's argument that advancement to partnership may never qualify as a term, condition, or privilege of employment, further held:

> The benefit a plaintiff is denied need not *be* employment to fall within Title VII's protection; it need only be a term, condition or privilege *of* employment. It is also of no consequence that employment as an associate necessarily ends when an associate becomes a partner. *A benefit need not accrue before a person's employment is completed to be a term, condition or privilege of that relationship. Pension benefits, for example, qualify as terms, conditions, or privileges of employment even though they are received only after employment terminates.*

Id. at 77 (citations omitted; emphasis added).

Eighteen years ago, this Court decided ***Los Angeles Dept. of Water & Power v. Manhart***, 435 U. S. 702 (1978), which provides a concrete example of a benefit or privilege of employment that is not furnished to or enjoyed by an employee until after the formal employment relationship has concluded. The employees' claim in ***Manhart*** was that the employer required male and female employees to make unequal contributions to an employer-operated pension plan even though male and female employees similarly situated in terms of age, years of service and salary would receive the same pension upon retirement. The Court held that the policy was unlawful sex discrimination under Title VII even though the benefit did not ripen until after the employment relationship had ended.

Although the anti-retaliation provision of Section 704(a) of Title VII refers only to "employees and applicants" and Section 701(f), 42 U.S.C. §2000e1(f), defines the term, "employee," to mean an "individual employed by an employer," ***Hishon*** and ***Manhart*** are authorities for holding that Title VII protects employees and former employees whose claim of discrimination is based on the denial of a benefit or privilege of employment that the employer confers on its employees but which does not ripen until after their formal employment relationship has concluded. Thus, Section 703(a)(1) must be construed *in para materia* with Sections 704(a) and 701(f) when determining the circumstances under which former employees are protected from retribution under Title VII.

Numerous types of post-employment fringe benefits are promised by employers to induce employees to remain on board, are earned during the employee's years of service, and are enjoyed only after the employee quits, is laid off, retires or dismissed. These fringe benefits routinely are awarded to employees who prevail in discrimination suits. Robert Belton, ***Remedies In Employment Discrimination Law*** §9.35 (1992)

(listing 19 forms of fringe benefits of which seven may not become available until after termination). The truth is that citizens will be reluctant to enforce their civil rights if their former employers can deny, delay or restrict their receipt of lucrative post-employment fringe benefits in reprisal for their decision to file charges with the EEOC. Even the mere threat of denial of a valuable fringe benefit such as long-term disability, severance pay, stock options or a job reference is a deterrence. *Cf.* ***Speiser v. Randall***, 357 U.S. 513, 526 (1958).

C. An Accurate Employment Reference is A 'Privilege' of Employment.

Employment references from former employers are one of the most valuable sources of information for prospective employers about prospective employees. *See* David C. Martin & Kathryn M. Bartol, ***Potential Libel and Slander Issues Involving Discharged Employees***, 13 Empl. Re. L.J. 43 (1987) (at least 95% of employers check references); Milton M. Mandell, ***The Selection Process: Choosing the Right Man for the Job*** 255-284 (1964) ("discussing study showing that 75% of respondent-employers rely on employment references and identifying the degrees used, e.g., telephone, mail, personal visits). The judiciary has recognized that it is "a fact of business life that employers almost invariably require applicants to provide the names of their previous employers as references when applying for a job.". ***Rutherford v. American Bank of Commerce***, 565 F.2d 1162, 1166 (10th Cir. 1977).

Lower courts have construed Sections 703(a)(1) and 704(a) together to hold that unfavorable (and inaccurate) references given by a former employer to a new, prospective employer may violate the anti-reprisal provision of Title VII. *See generally*, Patricia A. Moore, Note, ***Parting is Such Sweet Sorrow: The Application of Title VII to Post-***

Employment Retaliation, 62 Fordham L.Rev. 205 (1993). The leading case is ***Shehadeh v. Chesapeake & Potomac Tel. Co.***, 595 F.2d 711, 722 (D.C. Cir. 1978), where the plaintiff alleged that her former employer sent unfavorable references to a prospective employer because of her gender and her husband's ancestry. Holding that she had stated a claim under 703(a)(1) of Title VII even though she was no longer employed, the circuit court reasoned that if a former employee is protected under Section 704(a), she also should be protected against post-employment retaliation under Section 703(a)(1).

An employment reference is one of the privileges or benefits that an employer may provide to a former employee even though it is not obligated to do so under an express or implied contract of employment.[1] If an employer adopts a practice of giving employees references, as Shell Oil chose in this case, that practice qualifies as a "privilege" or benefit of

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[1] A recent development in employment references is that many employers have adopted policies, sometimes referred to as "no comment" or "neutral job reference" policies, according to which they refuse to provide references about former employees regardless of whether the request comes from the employees themselves or their prospective employers. *See generally* Bradley Saxton, *Flaws in the Law Governing Employment References: Problems of "Overdeterrence" and a Proposal for Reform*, 13 Yale L. & Pcy. Rev. 45 (1995) (discussing empirical surveys on the growing trend toward "no comment" policies). Because honest, accurate and complete references are among the types of information that employers find most useful when assessing the strengths and weaknesses of applicants, several commentators have advocated the adoption of a rule imposing an affirmative duty on employers to respond to requests for reference information about their former employees. *See* Bradley Saxton, *supra* at 91-99; John B. Lewis, Bruce L. Ottley & Gregory V. Mersol, *Defamation and the Workplace: A Survey of the Law and Proposals for Reform*, 54 Mo. L. Rev. 797, 854-870 (1989); Janet Swerdlow, Comment, *Negligent Referral: A Potential Theory for Employer Liability*, 64 So.Cal. L.Rev. 1645, 1672-73 (1991).

employment under Title VII. The practice of providing an employment reference comprises an "incident of employment," that is "part and parcel of the employment relationship" even though the benefit is not conferred until after the formal employment relationship concludes. ***Hishon***, 467 U.S. at 75. In this respect, a job reference is similar to a pension which ***Manhart*** recognized almost two decades ago as a benefit immunized from discrimination by Title VII even though it is received only after employment ceases.

A central purpose of Title VII will be undercut if an employer can escape its prohibition against discrimination by denying to an employee a valuable privilege of employment that does not ripen until after the formal relationship has ended. And it surely would defeat Section 704 if it were construed to allow an employer to retaliate against a former employee by giving her a false employment reference because she engaged in protected activities. As pointed out above, courts have recognized that employment references are a fact of business life. An accurate and honest reference, earned by the employee over years of loyal service, is an extremely valuable professional asset -- it is comparable to a corporation's reputation or goodwill, or the reputations of its product or the services it markets. Former employees are severely handicapped in their efforts to obtain new jobs if an employer retaliates against them by giving inaccurate, incomplete or false job references because they have asserted their rights under Title VII. Retaliatory references prevent the employee from mitigating damages. 42 U.S.C. §2000e-5(g). Moreover, a former employee likely will be subjected to retaliation by her new employer if it discovers that she was labelled a troublemaker by an earlier employer because she filed a charge with the EEOC or engaged in other protected conduct.

Ex-employees actually desire accurate job references containing relevant data about their work performance. They

are damaged by references containing false or irrelevant information (such as that the ex-employee filed a sexual harassment claim) when these are acts of retribution causally connected to activities immunized by §704. A retaliatory job reference is analogous to an employer's abuse of its qualified privilege in defamation law. Under the law of defamation, employers enjoy a qualified privilege to give prospective employers accurate references about current or former employees. ***Lewis v. Equitable Life Assurance Society***, 389 N.W.2d 876, 890 (Minn. 1986) is a much-cited case setting out the rational for the qualified privilege for employment references: "It is in the public interest that information regarding an employee's discharge be readily available to the discharged employee and to prospective employers, and we are concerned that, unless a significant privilege is recognized by the courts, employers will decline to inform employers of reasons for the discharges." *See also* ***Restatement (Second) Torts*** §595 *Comment* i (1977); Robert D. Sack and Sandra S. Barron, ***Libel, Slander and Related Problems*** §7.3.3.1 (1994). If Title VII is construed to cover ex-employees, employers will not be deterred from issuing honest, accurate, good faith job references because they already are protected from defamation claims by the qualified privilege. It is only when employers abuse the privilege that they forfeit its protection.

As a practical matter, it is not in the economic self-interest of employers to discriminatorily hinder their former employees from landing new jobs by giving them inaccurate or false job references. Reemployment reduces the plaintiff's claims for back pay, which is a prime component of damages in a civil rights suit. *Cf.* ***Albemarle Paper Co. v. Moody***, 422 U.S. 405 (1975); ***Ford Motor Co. v. EEOC***, 458 U.S. 219 (1982).

Finally, and on an even more practical level, it is standard practice for employers and employees, after discharge, to

negotiate severance packages or settlement agreements which encompass claims of discrimination, fringe benefits, and the exact language of references. Because the basic principle of employment law, the at-will presumption, favors management, it usually has the upper hand in these negotiations; but this rough balance is not entirely one-sided. If Section 704 does not protect ex-employees--those who are not working at the time of the act of retribution -- the little bargaining power workers have to negotiate an accurate job reference, a favorable letter of recommendation, the timely payment of fringe benefits, and to avoid post-discharge reprisal vanishes.

Conclusion

For the foregoing reasons, the National Employment Lawyers Association respectfully requests that Title VII be construed to protect "former employees," and that the judgement of the Fourth Circuit be reversed.

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No. 95-1376

IN THE
Supreme Court of the United States
OCTOBER TERM, 1995

CHARLES T. ROBINSON, SR.,
Petitioner,

v.

SHELL OIL COMPANY,
Respondent.

On Writ of Certiorari to the United States Court of Appeals for the Fourth Circuit

BRIEF AMICI CURIAE OF THE LAWYERS' COMMITTEE FOR CIVIL RIGHTS UNDER LAW, AMERICAN ASSOCIATION OF RETIRED PERSONS, AMERICAN CIVIL LIBERTIES UNION, NATIONAL ASSOCIATION FOR THE ADVANCEMENT OF COLORED PEOPLE, NOW LEGAL DEFENSE FUND, AND THE WOMEN' S LEGAL DEFENSE FUND IN SUPPORT OF PETITIONER

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INTEREST OF *AMICI CURIAE*[1]

The Lawyers' Committee for Civil Rights Under Law was founded in 1963 by leaders of the American bar, at the request of President Kennedy, to involve private attorneys throughout the country in the national effort to assure to all Americans the protections of the civil rights laws. Through the Lawyers' Committee and its local affiliates in Boston, Chicago, Denver, Los Angeles, Philadelphia, San Antonio, San Francisco, and Washington, D.C., hundreds of lawyers from many of the nation's leading law firms have joined to represent many thousands of victims of discrimination across the country in cases brought under Title VII of the Civil Rights Act of 1964, 42 U.S.C. § 2000e *et seq.* ("Title VII") and under the other civil rights laws. The Lawyers Committee has a longstanding interest in the scope of coverage and effective enforcement of Title VII and other civil rights laws.

The American Association of Retired Persons (AARP) is a nonprofit membership organization of persons age 50 and older that is dedicated to addressing the needs and interests of older Americans. More than one-third of AARP's thirty-three million members are employed individuals, most of whom are protected by Title VII and the Age Discrimination in Employment Act, 29 U.S.C. § 621 *et seq.* ("ADEA"). One of AARP's primary objectives is to

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[1] Petitioner and Respondent have consented to the filing of this brief and the parties' letters of consent have been filed with the clerk of this Court.

achieve dignity and equality in the work place through positive attitudes, practices, and polices regarding work and retirement. As part of its advocacy effort, AARP has filed more than 125 *amicus curiae* briefs in the United States Supreme Court, federal appellate and district courts, and state courts regarding the proper interpretation and enforcement of federal and state anti-discrimination laws to insure that the rights of older workers are fully protected.

The National Association for the Advancement of Colored People (NAACP), established in 1909, is the nation's oldest civil rights organization. The fundamental mission of the NAACP includes promoting equality of rights, eradicating caste and race prejudice among the citizens of the United States and securing for African Americans and other minorities increased opportunities for employment.

NOW Legal Defense and Education Fund (NOW LDEF) is a leading national non-profit civil rights organization that performs a broad range of legal and educational services in support of women's efforts to eliminate sex-based discrimination and secure equal rights. NOW LDEF was founded in 1970 by leaders of the National Organization for Women. A major goal of NOW LDEF is the elimination of barriers that deny women economic opportunities, including employment discrimination under Title VII of the Civil Rights Act of 1964. In furtherance of that goal, NOW LDEF litigates cases to secure full enforcement of employment discrimination laws, including *Robinson v. Jacksonville Shipyards, Inc.*, 760 F. Supp. 1486

(M.D. Fla. 1991), and *Townsend v. Indiana University*, 995 F.2d 691 (7th Cir. 1993).

Founded in 1971, the Women's Legal Defense Fund (WLDF) is a national advocacy organization that develops and promotes public policies to help women achieve equal opportunity, quality health care, and economic security for themselves and their families. Over its 25-year history, WLDF has placed special emphasis on equal employment opportunity by challenging sex-based discrimination in the courts, and by leading efforts to promote employment policies such as the 1993 Family and Medical Leave Act and the 1978 Pregnancy Discrimination Act.

SUMMARY OF ARGUMENT

The language of Title VII requires an interpretation that covers retaliation against former employees. Section 704(a) requires only that an employment relationship be linked to the retaliatory conduct. The necessary link need not be that of current employment. Section 701(f) does not exclude former employees, although it does contain express exclusions as to certain groups.

The denial of benefits earned during covered employment, but taking effect after the end of such employment, violates the statute, as this Court held in *Hishon v. King & Spalding,* 467 U.S. 69 (1984).

The policy of Title VII precludes an interpretation that will render its anti-retaliation provisions meaningless.

The Fourth Circuit's decision leaves the discriminating employer free to retaliate against any employee who has left its employment for nondiscriminatory reasons, whether voluntary or involuntary. The lack of protection against retaliation will cause current employees not to seek the protections of Title VII, and will cause them to refuse to provide truthful testimony in support of a Title VII claim, since doing so could result in, among other things, loss of post-employment benefits and the inability to obtain a decent job in the future. Leaving former employees without recourse against retaliation would profoundly frustrate the goals of Title VII.

ARGUMENT

Seven Circuits have held that former employees are covered by the anti-retaliation provisions of Title VII and parallel statutes.[2] The Fourth Circuit, in departing from the

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[2] The Second, Third, Fifth, Sixth, Ninth, Tenth, Eleventh, and District of Columbia Circuits have all held that former employees have a cause of action against employers who retaliate under Title VII and statutes with nearly identical provisions. The only two circuits which have reached the opposite result are the Fourth Circuit and the Seventh Circuit.

In *Reed v. Shepard*, 939 F.2d 484 (7th Cir. 1991), the Seventh Circuit declined, without explanation, to follow other circuits in allowing former employees to pursue claims under Title VII's anti-retaliation section. In its one-paragraph discussion of the issue the court stated: "[T]he alleged retaliatory activities took place *after* the termination of Reed's employment and was therefore not an adverse employment action. Under § 2000e-3(a), it is an employee's discharge or other employment impairment that evidences actionable retaliation, and *not* events subsequent to and unrelated to his

result reached by other Circuits, purported to base its decision on the text of the statute, but without considering most of the relevant sections of the statute. We discuss the relevant sections of the statute first and then turn to the Fourth Circuit's analysis.

I. BOTH THE LANGUAGE OF SECTION 704 AND THIS COURT'S INTERPRETATIONS OF THE ACT PROHIBIT DISCRIMINATORY CONDUCT ARISING FROM THE EXISTENCE OF AN EMPLOYMENT RELATIONSHIP, WHETHER THE CONDUCT OCCURS DURING OR FOLLOWING EMPLOYMENT.

A. Former Employees Have the Nexus of an Employment Relationship, Which is All That is Required to Obtain the Protections of §704(a).

A broad interpretation of §704(a), the anti-retaliation section of Title VII, is required by the language of the statute. Section 704(a) states:

> It shall be an unlawful employment practice for an employer to discriminate against any of his employees or applicants for employment, . . . because he has opposed any practice

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employment." 939 F. 2d at 492-493 (emphasis in original). Because nothing in the language of the statute provides a basis for such an interpretation and the court did not see fit to explain its conclusion, *Reed* provides little support to the position taken by the Fourth Circuit.

> made an unlawful employment practice by this subchapter, or because he has made a charge, testified, assisted, or participated in any manner in an investigation, proceeding, or hearing under this subchapter.

42 U.S.C. §2000e-3(a).

The language of §704(a) clearly provides protections from retaliation where there is the nexus of an employment relationship between the person seeking protection and the retaliating employer. However, it is clear from the text of the section that the employment relationship which creates an obligation under §704(a) need not be current employment.

Section 704(a) expressly includes within its protection those individuals adversely affected by an employer's conduct even in the absence of a current employment relationship. Specifically, §704(a) encompasses both "employees" and "applicants for employment." Applicants for employment, by definition, cannot have a current employment relationship with the employer.

By including "applicants for employment," the drafters of §704(a) clearly intended to extend anti-retaliation protection to those not currently employed by the employer. Because §704(a) is unambiguously intended to encompass some persons not currently employed, there is no basis on which to impose a limitation of current employment on those with actual employment relationships. Indeed, the required nexus exists to a greater extent for former employees than

for applicants, because former employees have had an actual employment relationship.

An employer's ability to retaliate against a former employee is no less real than an employer's ability to harm a never-employed applicant. Pension benefits, severance pay, recommendations, and the like, are derived from an employment relationship. Section 704(a) "prohibits discrimination related to or arising out of an employment relationship, whether or not the person discriminated against is an employee at the time of the discriminatory conduct." *Pantchenko v. C.B. Dolge Company, Inc.*, 581 F.2d 1052, 1055 (2d Cir. 1978); *EEOC v. Cosmair, Inc., L'Oreal Hair Care Div.*, 821 F.2d 1085, 1088 (5th Cir. 1987) ("The term 'employee,' however, is interpreted broadly: it includes a former employee as long as the alleged discrimination is related to or arises out of the employment relationship.") (ADEA); *Passer v. American Chemical Society*, 935 F.2d 322, 330 (D.C. Cir. 1991) (ADEA). In the context of retaliation, the ability of an employer to harm a former employee only arises out of, and exists by virtue of, the employment relationship.

B. The Definition Of "Employee" In Section 701(f) Encompasses Former Employees.

The Act's definition of "employee" contains no indication of an intent to exclude former employees. Section 701(f) of Title VII defines "employee" as follows:

> The term "employee" means an individual employed by an employer, except that the term "employee"

> shall not include any person elected to public office in any State or political subdivision of any State by the qualified voters thereof, or any person chosen by such officer to be on such officer's personal staff, or an appointee on the policy making level or an immediate adviser with respect to the exercise of the constitutional or legal powers of the office. The exemption set forth in the preceding sentence shall not include employees subject to the civil service laws of a State government, governmental agency or political subdivision. With respect to employment in a foreign country, such term includes an individual who is a citizen of the United States.

42 U.S.C. §2000e(f), as amended by the Civil Rights Act of 1991, Pub. L. No. 102-166, §109, 105 Stat. 1077.

The essence of the definition of employee is found in the language "an individual employed by an employer." The word "employed" denotes both the past and present tense. As such, it necessarily includes all of those employed by an employer, whether or not the person continues to work for the employer.

This central definition is followed by several exclusions. None of the several exclusions limits the statute's reach to individuals currently employed by an employer. Where the tense of the language used is inclusive and the express exclusions do not limit the tense, there is no textual basis on which to eliminate former employees from §704(a)'s coverage.

In *Robinson v. Shell Oil Company*, 70 F.3d 325, 330 (4th Cir. 1995) the court held: "Because 'former employees' are not included in the statutory language, Title VII's anti-retaliation provision does not protect them." However, the language of the statute is not so narrowly written that it requires an interpretation which excludes former employees. In fact, in order to be as narrow as the Fourth Circuit holds, the term "currently" would have to be inserted before "employed." Despite the Fourth Circuit's refusal to read the section as inclusive of "former employees," its interpretation implicitly requires it to read the section as exclusive to "current employees," a term not used in the section. The coverage of former employees is more consistent with the language used by Congress and, as demonstrated below, with the purposes of Congress as well.

C. The Application of Section 704(a) to Post-employment Unlawful Acts is Consistent With Other Provisions of Title VII.

Termination of employment does not end an employer's obligations under Title VII. *Hishon v. King & Spalding*, 467 U.S. 69, 77 (1984), makes clear that Title VII protects post-employment obligations that arise out of the employment relationship:

> The benefit a plaintiff is denied need not be employment to fall within Title VII's protection; it need only be a term, condition, or privilege of employment. . . . A benefit need not accrue before a person's employment

> is completed to be a term, condition, or privilege of that employment relationship.

Denial of these benefits because of an employee's race, sex, national origin, or religion would result in a violation of Title VII. *Id.* "'There is no ground for affording any less protection [against retaliation] to defendant's former employees than to its present employees' under Title VII." *E.E.O.C. v. J.M. Huber Corp.* 927 F.2d 1322, 1331 (5th Cir. 1991) (quoting *Rutherford v. American Bank of Commerce,* 565 F.2d 1162, 1166 (10th Cir. 1977)).

Under the Fourth Circuit's view, determining whether any particular retaliatory activity is covered or not covered by the Act would depend solely on the fortuity of timing: did the employer wait until the employee who engaged in protected activity was no longer employed? If so, the retaliation would not be a violation and the benefits accrued during employment could be retaliatorily denied without recourse pursuant to Title VII.

Each individual provision of a statute should be interpreted consistently with and in light of other provisions, as well as the statute as a whole. *Phelps Dodge v. NLRB*, 313 U.S. 176, 190 (1940). Other sections of Title VII also indicate that the term "employee" is meant to include former employees. For example, section 706(b) contains a provision which protects the confidentiality of matters discussed during any conciliation efforts between the Commission and the parties: "Nothing said or done during and as a part of such informal endeavors may be made public by the Commission, its officers or *employees*, or used

as evidence in a subsequent proceeding without the written consent of the persons concerned." 42 U.S.C. §2000e-5(b) (emphasis added). Under the Fourth Circuit's interpretation of the term "employee," the statutory obligation of confidentiality imposed on EEOC employees would evaporate the day they left the EEOC, and former EEOC employees could then publicly expose any and all information regarding an employer gathered during a conciliation.

Similarly, although §703, which describes unlawful employment practices,[3] appears to be written in the present tense and, thus, to prohibit only present or ongoing practices, such an interpretation, like the Fourth Circuit's

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[3] Section 703(a) provides:

> It shall be an unlawful employment practice for an employer —
>
> (1) to fail or refuse to hire or to discharge any individual, or otherwise to discriminate against any individual with respect to his compensation, terms, conditions, or privileges of employment, because of such individual's race, color, religion, sex, or national origin; or
>
> (2) to limit, segregate, or classify his employees or applicants for employment in any way which would deprive or tend to deprive any individual of employment opportunities or otherwise adversely affect his status as an employee, because of such individual's race, color, religion, sex, or national origin.

42 U.S.C. §2000e-2(a).

approach in this case, would be too narrowly literalistic. Section 706(b) permits charges to be filed against an employer who "*has engaged* in an unlawful employment practice" and §706(g)(1) expressly provides a remedy for practices "the respondent *has intentionally engaged in* or is intentionally engaging in . . . ." (emphasis added) Sections 706(b) and -(g)(1), therefore, reveal that, despite the apparent present tense of §703(a), that section creates liability for past discriminatory practices and is not limited to present discriminatory practices.

In *International Brotherhood of Teamsters v. United States,* 431 U.S. 324 (1977), this Court rejected a literal reading of §703 that would have immunized the employer from liability for previous discriminatory hiring practices. Recognizing the effect of such a narrow interpretation, this Court found liability for past illegal discrimination even without the continued existence of illegal discrimination. Id. at 342-43. "The company's later changes in its hiring and promotion policies could be of little comfort to the victims of the earlier post-Act discrimination, and could not erase its previous illegal conduct or its obligation to afford relief to those who suffered because of it." Id. at 341-42. The language of §703, despite its use of the present tense, necessarily includes events which occurred in the past.

Following this Court's interpretation in *Teamsters*, the existence of language in the present tense does not require a narrow interpretation limited to current conditions, and cannot be interpreted to exclude past or former conditions normally encompassed by use of the past tense. This logic is applicable to construing §701(f) and the definition of "employee." Even if the term "individual employed" is capable of being viewed as written in the present tense, it should be interpreted to include former employees.

D. The Fourth Circuit's Construction Creates a Strained Result.

Indisputably §704(a) prohibits an employer from retaliating against an applicant who filed an EEOC charge, provided information as a witness, or engaged in other protected activity with respect to a former employer. The irrational result caused by the Fourth Circuit's interpretation of the retaliation provisions of Title VII is apparent from its application to a hypothetical example of retaliation. If John Jones testified truthfully in support of a coworker's sexual harassment claim at company "X" and then left and sought a job at company "Y," company "Y" would clearly violate the law if it refused to hire Jones because of his testimony. Company "Y" would equally clearly violate the law if it refused to hire Jones because of a retaliatory reference from company "X" that company "Y" knew to be retaliatory. The absurdity of the Fourth Circuit's interpretation is made plain by the fact that its reading of §704(a) would immunize company "X" for providing a retaliatory bad reference but

penalize company "Y" for acting on it, when both knew it to be false and retaliatory!

This court has recognized that discrimination under Title VII can take the form of creating a workplace environment that is hostile to a particular race or gender. *Meritor Savings Bank v. Vinson,* 477 U.S. 57 (1986); *Harris v. Forklift Systems, Inc.*, 510 U.S. 17 (1993). The Fourth Circuit's decision would require victims of extreme sexual or racial harassment to remain in their employment, no matter how harmful to the psychological health of the employee, or forfeit the protection of the Act for any subsequent retaliation. This result would be at war with the intent of Congress.

The Court in *Chandler v. Roudebush*, 425 U.S. 840 (1976), rejected such "strained and unnatural" readings and set forth what it described as an "elementary canon of construction:"

> This Court pointed out in *Lynch v. Alworth-Stephens Co.*, 267 U.S. 364, 370, that "the plain, obvious and rational meaning of a statute is always to be preferred to any curious, narrow, hidden sense that nothing but the exigency of a hard case and the ingenuity and study of an acute and powerful intellect would discover."

425 U.S. at 848.

II. TO ACHIEVE THE GOALS OF TITLE VII, FORMER EMPLOYEES MUST BE PROTECTED UNDER SECTION 704(a).

A statute must be interpreted so as to give effect to its purpose. *Bob Jones University v. United States*, 461 U.S. 574, 586 (1983). The purpose of Title VII has been clearly stated by this Court:

> The language of Title VII makes plain the purpose of Congress to assure equality of employment opportunities and to eliminate those discriminatory practices and devices which have fostered racially stratified job environments to the disadvantage of minority citizens.

McDonnell Douglas Corp. v. Green, 411 U.S. 792, 800 (1973). The purpose of Title VII can only be achieved by an application of its retaliation provision to former employees.

This Court's decision interpreting provisions of the National Labor Relations Act ("NLRA") consistent with its broad purposes provides guidance. In *Phelps Dodge Corp. v. NLRB*, 313 U.S. 177, 182 (1940), this Court considered the NLRA's terms in light of its goals:

> Its ultimate concern, as well as the source of its power, was 'to eliminate the causes of certain substantial obstructions to the free flow of commerce.' This vital national

> purpose was to be accomplished 'by encouraging the practice and procedure of collective bargaining and by protecting the exercise by workers of full freedom of association.'

To accomplish the goals of the NLRA, this Court interpreted the term "employee" as defined in the Act in a manner different then a literal reading of the language. At the time of the *Phelps Dodge* decision, the NLRA defined "employee" in relevant part:

> The term "employee" shall include any employee, and shall not be limited to the employees of a particular employer, unless the Act explicitly states otherwise, and shall include any individual whose work has ceased as a consequence of, or in connection with, any current labor dispute or because of any unfair labor practice, and who has not obtained any other regular and substantially equivalent employment.

313 U.S. at 190. A narrowly literal reading of this provision would be that former employees who have obtained regular and substantially equivalent employment are not "employees" within the meaning of the NLRA. In *Phelps Dodge*, however, two men who had been denied employment because of their union affiliation were held entitled to relief as "employees" notwithstanding their having obtained the nominally disqualifying "regular and substantially equivalent employment."

Noting that the Board "acts in a public capacity to give effect to the declared public policy of the Act to eliminate and prevent obstructions to interstate commerce by encouraging collective bargaining," 313 U.S. at 193, the Court found that denying the Board "power to neutralize discrimination merely because workers have obtained compensatory employment would confine the 'policies of this Act' to the correction of private injuries." 313 U.S. at 192-93. "To limit the significance of discrimination merely to questions of monetary loss to workers would thwart the central purpose of the Act." *Id.*

This case presents a much easier question then *Phelps Dodge*. Inclusion of "former employees" within §704(a) is entirely consistent with the language of the Act. In any event, *Phelps Dodge* makes it abundantly clear that any ambiguity in language must be resolved in favor of an interpretation that fully serves the purposes of the Act. The Fourth Circuit's interpretation of the statute would thwart the central remedial purpose of Title VII and eviscerate the protection of §704(a).

The importance of providing protection against retaliation is made clear by this Court's holding that even the right to file a lawsuit may be enjoined if it is retaliatory and lacks a reasonable basis. In *Bill Johnson's Restaurants, Inc. v. NLRB*, 461 U.S. 731 (1983), this Court considered the rights of an employer to file a lawsuit against an employee allegedly in retaliation for actions protected under the NLRA. A waitress who believed her termination was based on her efforts to organize a union filed unfair labor practice charges with the Board. After filing the charges, she and

three co-waitresses picketed the restaurant. The restaurant manager confronted the picketers and threatened to "get even" with them. Five days after the picketing, the owner-employers filed suit against the picketers alleging, among other claims, that defendants had, "engaged in mass picketing, harassed customers, blocked public ingress to and egress from the restaurant." 461 U.S. at 734. This Court held that the Board may lawfully order an employer to cease and desist from the maintenance of a baseless suit motivated by retaliation. *Id.*

In reaching its holding, the Court emphasized the potential for coercive practices by an employer.

> A lawsuit no doubt may be used by an employer as a powerful instrument of coercion or retaliation. As the Board has observed, by suing an employee who files charges with the Board or engages in other protected activities, an employer can place its employees on notice that anyone who engages in such conduct is subjecting himself to the possibility of a burdensome lawsuit. Regardless of how unmeritorious the employer's suit is, the employee will most likely have to retain counsel and incur substantial legal expenses to defend against it.

Bill Johnson's, 461 U.S. at 740-41.

As this Court has emphasized on more than one occasion, "the private litigant not only redresses his own

injury but also vindicates the important congressional policy against discriminatory employment practices." *Alexander v. Gardner-Denver Company*, 415 U.S. 36, 45 (1974); *McKennon v. Nashville Banner Publishing Co.*, 513 U.S. ___, 130 L.Ed 2d 852, 861 (1995); *International Brotherhood of Teamsters v. U.S.*, 431 U.S. 324, 364 (1977). Retaliation against those who exercise their rights under a statute, or who assist others in seeking to protect their rights, debilitates the effective enforcement of a statute. *Mitchell v. DeMario Jewelry*, 361 U.S. 288, 292 (1960) (effective enforcement could only be achieved if employees felt free to approach officials with their grievances) (FLSA); *Bailey v. USX Corp.*, 850 F.2d 1506, 1509 (11th Cir. 1988) (interpretation excluding former employees would "undercut the obvious remedial purposes of Title VII"). A narrowing of these vital rights creates "loopholes" in the protections against retaliation. The gaping hole created by the Fourth Circuit's holding will render Title VII's anti-retaliation provision meaningless.

In this country, employment is not a lifetime proposition. Bad or untruthful references may preclude employees from obtaining the jobs for which they have the most training and experience. Indeed, the Fourth Circuit itself has recognized the importance of post-employment references. In *Wirtz v. B.A.C. Steel Products, Inc.*, 312 F.2d 14, 16 (4th Cir. 1962), an FLSA case, the court stated: "The average employee involved in this type of action is keenly aware of his dependence upon his employer's good will, not only to hold his job but also for the necessary job references essential to employment elsewhere." *See also Rutherford v. American Bank of Commerce*, 565 F.2d 1162

(10th Cir. 1977) (former employer refused to provide reference without including fact that plaintiff had filed a sex discrimination charge); *Sherman v. Burke Contracting, Inc.*, 891 F.2d 1527 (11th Cir. 1990), *cert. den.*, 498 U.S. 943 (1990) (employee blacklisted after filing EEOC charge). In fact, harmful post-employment conduct by an employer can far exceed a negative reference. *Berry v. Stevinson Chevrolet*, 74 F.2d 980 (10th Cir. 1996) (employer retaliated against a former employee who had filed an EEOC charge by filing false criminal charges against him.) Creating a safe harbor for retaliation will increase fears exponentially because all employees will know there will be a point at which employers can retaliate against them with impunity.

Civil rights organizations such as *amici* well know that without the strong guarantee against retaliation, it will become more difficult for persons with meritorious claims to be able to obtain the truthful testimony of present and former coworkers in order to prove the merits of their claims. The effects of retaliatory conduct do not stop with the person targeted, but work to chill current employees from pursuing statutory protections. "[F]ear of economic retaliation might often operate to induce aggrieved employees quietly to accept substandard conditions." *Mitchell v. DeMario Jewelry*, 361 U.S. 288, 292 (1960).

In a statute which relies "on information and complaints received from employees seeking to vindicate rights claimed to have been denied . . . effective enforcement could thus only be expected if employees felt free to approach officials with their grievances." *Mitchell v. DeMario Jewelry*, 361 U.S. at 292. The decision of the

Fourth Circuit effectively forecloses that possibility. Faced with knowledge of prior retaliatory acts against former employees, potential lack of recourse in the event of retaliation, and the denial of benefits necessary for obtaining a new job, all but the most fearless employee would be hesitant to testify about even the most blatant Title VII violation.

This Court, in *McKennon v. Nashville Banner,* 513 U.S. at ___, 130 L. Ed 2d at 864, stated:

> The concern that employers might as a routine matter undertake extensive discovery into an employee's background or performance on the job to resist claims under the Act is not an insubstantial one . . . .

This case presents a far greater danger. Unlike the situation in *McKennon*, where employees who are subjected to abusive discovery can seek the protection of the court, *Robinson* provides former employees no such avenue of redress. The employer is welcome to retaliate with impunity against its former employees. This retaliatory action will be felt and witnessed not only by the targeted employee but also by her former coworkers and colleagues still at work for the employer. Without the assurance that there is recourse against a retaliating employer, both current and former employees may decide that complaints are best left unstated and the truth best left untold. In short, affirmance of the decision below will greatly weaken the vital enforcement component of Title VII. Accordingly, *amici* respectfully

request that the Court reverse the holding of the Fourth Circuit and remand the cause for trial.

CONCLUSION

For the foregoing reasons, the decision of the Court of Appeals should be reversed.

Dated: June 21, 1996

Respectfully submitted,

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IN THE
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OCTOBER TERM, 1995

CHARLES T. ROBINSON, SR.,

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v.

SHELL OIL COMPANY,

Respondent.

On Writ of Certiorari to the United States Court of Appeals for the Fourth Circuit

BRIEF AMICUS CURIAE OF THE WASHINGTON LEGAL FOUNDATION IN SUPPORT OF RESPONDENT

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QUESTION PRESENTED

Whether former employees are included under the term "employees" in Section 704(a) of the Civil Rights Act of 1964, 42 U.S.C. § 2000e-3(a) which prohibits an employer from discriminating against any of its "employees or applicants for employment" because they have availed themselves of Title VII's protections.

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IN THE
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On Writ of Certiorari to the United States Court of Appeals for the Fourth Circuit

---

BRIEF AMICUS CURIAE OF THE WASHINGTON LEGAL FOUNDATION IN SUPPORT OF RESPONDENT

INTERESTS OF AMICUS CURIAE

The Washington Legal Foundation (WLF) is a non-profit public interest law and policy center based in Washington, D.C., with supporters nationwide. While WLF engages in litigation and the administrative process in a variety of areas of the law, WLF devotes a substantial portion of its resources to cases raising civil rights issues. In that regard, WLF has appeared as amicus curiae in numerous civil rights cases before this Court. *See, e.g.*,

City of Richmond v. J.A. Croson, 488 U.S. 469 (1989); *St. Mary's Honor Center v. Hicks*, 113 S. Ct. 2742 (1993); *Adarand Constructors, Inc. v. Pena*, 115 S. Ct. 2097 (1995); *Miller v. Johnson*, 115 S. Ct. 2475 (1995).

WLF also has an interest in ensuring that courts do not exceed their judicial powers by usurping the role of the legislative branch in interpreting statutory language. Accordingly, WLF submits that the court of appeals below was correct in interpreting the term "employees" in Section 704(a) of Title VII to mean only those persons who are currently employed at the time the alleged discriminatory act took place. Any enlargement of that term so as to encompass former employees as suggested by Petitioner and his amici should be made legislatively rather than judicially.[1]

STATEMENT OF THE CASE

Petitioner's employment with Shell Oil Company was terminated on October 13, 1991, under a severance program. He filed a racial discrimination complaint against the company with the Equal Employment Opportunity Commission (EEOC).[2] While that charge was pending, the

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[1] This brief is filed with the written consent of the parties. The letters of consent have been filed with the Clerk of this Court.

[2] Petitioner subsequently filed suit in 1993 on the discharge claim in district court. Following a trial in which there was no evidence of discrimination, the court entered a judgment for Shell.

petitioner applied for a job with Metropolitan Life Insurance Company.

When Metropolitan requested that Shell complete a routine questionnaire regarding the Petitioner's past performance, Shell gave below average ratings, indicated that Robinson's termination was not voluntary, and that Shell would not rehire him. Petitioner then filed a second discrimination complaint alleging that Shell violated Section 704(a) by providing negative performance ratings because he had filed a discriminatory discharge complaint.

Petitioner subsequently filed suit on the retaliation claim. The district court dismissed the case, relying on the Fourth Circuit's decision in *Polsby v. Chase*, 970 F.2d 1360 (4th Cir. 1992), *vacated sub nom. Polsby v. Shalala*, 507 U.S. 1048 (1993), and held that Section 704(a) applies only to current employees or applicants for employment, not former employees. The court of appeals on rehearing *en banc*, affirmed the district court, holding that the plain meaning of the term "employees" does not extend to former employees. *Robinson v. Shell Oil Co.*, 70 F.3d 325 (4th Cir. 1995).

SUMMARY OF ARGUMENT

Applying basic rules of statutory construction, the court of appeals correctly ruled that the term "employees" in Section 704(a) does not include former employees. Both the plain meaning of the term, as well as the context in which it is used in Section 704(a), clearly demonstrate that former employees are not included within its coverage.

Extending the term "employees" to include former employees would not only be contrary to rules of statutory

construction, but also would have adverse policy consequences by extending employer liability indefinitely with respect to former employees; causing confusion among employers as to when one employer's potential liability ends and another employer's liability begins; bypassing more appropriate remedies under state tort and contract law regarding employer liability for negative performance evaluations; and undermining the integrity of good employment recommendations.

ARGUMENT

I. INTERPRETING SECTION 704(a) OF TITLE VII TO INCLUDE "FORMER EMPLOYEES" VIOLATES THE PLAIN MEANING OF THE ANTI-RETALIATION PROVISION AND OTHER RULES OF STATUTORY CONSTRUCTION.

The task of resolving a dispute over the meaning of a statute begins with the language of the statute itself. *United States v. Ron Par Enters., Inc.*, 489 U.S. 235, 241 (1949). When the language of the statute is "unambiguous, judicial inquiry is complete, except in 'rare and exceptional circumstances'." *Garcia v. United States*, 469 U.S. 70, 75 (1984) (citation omitted). In ascertaining the plain meaning of a statute, courts look to the particular statutory language at issue, as well as the design of the statute as a whole. *K-Mart Corp. v. Cartier, Inc.*, 486 U.S. 281, 291 (1988). No deference is due to interpretations at odds with the plain language of the statute. *Public Employees Retirement Sys. of Ohio v. Betts*, 492 U.S. 158, 171 (1989). Even longstanding agency interpretations must fall to the extent they conflict with statutory language. *Id.*

The anti-retaliation provision of Title VII of the Civil Rights Act of 1964, 42 U.S.C. § 2000e-3(a), provides that:

> It shall be an unlawful employment practice for an employer to discriminate against any of his employees or applicants for employment . . . because he has made a charge, testified, assisted, or participated in any manner in an investigation, proceeding, or hearing under this subchapter.

42 U.S.C. § 2000e-3(a). To hold that "former employees" are covered under Section 704(a) violates the plain language of Section 704(a). "Employee" is defined in Title VII as "an individual employed by an employer." 42 U.S.C. § 2000e(f). Formerly employed individuals are simply not "employed by an employer."

While amicus submits that this should be the end of the inquiry, the context in which the term "employee" is used in Section 704(a) further underscores the correctness of the lower court's conclusion. Section 704(a) specifically distinguishes between "employees" and "applicants for employment," while omitting any reference to "former employees." *Id.* With "applicants for employment" made distinct from "employees" in Section 704(a), Congress evidenced its intent that the definition of "employee" be limited in scope. The boundaries of the term "employee" are thus clearly established by the context in which it appears in this anti-retaliation provision.

There are three basic arguments Petitioner and his amici make to extend the term "employee" in Section 704(a) to include former employees. The first argument is

that the common use of the term "employee" as it is used in other statutes has been interpreted by courts to refer to present, future, and past employment. Pet. Br. at 8, 17-20; EEOC Br. at 12, 15. The second claim is that the term "employee" as used in other provisions of Title VII has been interpreted to include former employees, and therefore, the same interpretation should apply in this instance. Pet. Br. at 13-17; EEOC Br. at 10, 12, 14. The third argument is that the text and purpose of Title VII and the anti-retaliation provision require an extension of "employees" in Section 704(a) to include former employees; excluding coverage to former employees would allegedly sanction or encourage employer intimidation. Pet. Br. at 20-36; EEOC Br. at 16-21. All three of these arguments are without merit.

A. In Section 704(a), the Term "Employee" Is Not Ambiguous Because Its Meaning and Scope Is Determined By Its Definition and the Context In Which It Appears In the Provision.

In the anti-retaliatory provision, the term "employee" is not ambiguous because the definition of the term in Title VII is clear and its scope is defined by the context in which it appears in the provision. "Ambiguity" is defined as "uncertainty of meaning of an expression used in a written instrument." *Black's Law Dictionary* 73 (5th ed. 1979).

We agree with Petitioner that the term "employee" may in certain circumstances be unclear or ambiguous. The fact that the term "employee" is ambiguous as used in some other contexts or other laws, however, does not necessarily mean that the term "employee" is always ambiguous.

"Employee" in Section 704(a) is one of those cases where the term's definition, in light of its context within the provision, provides clarity as to its meaning. The fundamental principle of statutory construction is that the meaning of a word cannot be determined in isolation, but must be drawn from the context in which it is used. *Deal v. United States*, 113 S. Ct. 1993, 1996 (1993); *see K-Mart Corp.*, 486 U.S. at 291 ("in ascertaining the plain meaning of a statute, courts look to the particular statutory language at issue, as well as the language and design of the statute as a whole"). Indeed, statutory language must always be read in its proper context. *McCarthy v. Bronson*, 500 U.S. 136, 139 (1991).

First, the term "employee" as defined in Title VII "*means* an individual employed by an employer." 42 U.S.C. § 2000e(f) (emphasis added). This subsection does not define "employee" by using the open-ended word "includes" as do some other definitions in this section. *See, e.g.*, 42 U.S.C. §§ 2000e(a) ("'person' includes. . ."); (j) ("'religion' includes. . . "). Thus, a former employee cannot be said to be an "individual employed by an employer."

Furthermore, the term "applicants for employment" used in conjunction with "employee" in Section 704(a) dispels any ambiguity the term "employee" may have within the provision. Congress's insertion of "applicants" in the provision signified that "employee" in Section 704(a) did not extend to applicants for employment. Otherwise, Congress would not have felt it necessary to include the term "applicants for employment" in the provision. Following the fundamental principles of statutory construction, the term "employees" in Section 704(a), by excluding applicants from its definition, requires an

exclusion of former employees with respect to the same provision.

Petitioner cites a few cases where the term "employee" was used in other statutes to refer to former employees. Pet. Br. at 4, citing *Betts*, *supra*, (pensioners); *Nash v. Florida Industrial Comm'n*, 389 U.S. 235 (1967) (unemployed individuals); *Fleming v. Nester*, 363 U.S. 603 (1960) (retired workers). In those cases, however, the definition of "employees" was determined from the term's context within the particular statute.

In the case at bar, "employees" is also defined from its context in Section 704(a). Unlike those cases where the term "employees" was interpreted broadly, however, the context of the term "employees" in Section 704(a) requires a narrow application of the term. Indeed, with "applicants for employment" distinct from "employees," it is inconsistent with the fundamental rules of statutory construction to interpret "employees" broadly so as to include former employees.

Even Petitioner's amicus EEOC is forced to concede that "not . . . every statutory reference to 'employees' includes all former employees; context may require a more limited construction." EEOC Br. at 13, citing *Allied Chem. & Alkali Workers of Am. v. Pittsburgh Plate Glass Co.*, 404 U.S. 157, 168 (1971) ("the ordinary meaning of 'employee' does not include retired workers"). In the case at bar, the context of "employees" as used in Section 704(a) requires a more limited construction.

Thus, the term "employee" is not ambiguous because the insertion of "applicants" in the same provision evidences Congress' intent not to include former employees

within the coverage of Section 704(a). As the court of appeals below correctly observed, "Congress' inclusion of 'applicants for employment' as persons distinct from 'employees,' coupled with its failure to likewise include 'former employees,' is strong evidence of Congressional intent that the term 'employees' in [Section 704(a)] does not include former employees." *Robinson v. Shell Oil Co.*, 70 F.3d at 330.

Indeed, the legislative history of Title VII further confirms that Congress intended "employee" as used in Section 704(a) to be narrowly construed. During the drafting stages of Title VII, Congress considered using the term "persons" in place of "employees." H.R. Rep. No. 1370, 87th Cong., 2d Sess., at 11 (1962). "Persons" are obviously a larger group than "employees." However, the provision as enacted contains the more limiting term "employees." If Congress wanted to cover former employees under this provision, it could have easily used the term "persons" in the statute. Congress chose not do so. Therefore, "employee" in Section 704(a) has a more limiting construction than Petitioner contends.

B. Interpreting "Employee" Broadly in Other Sections of Title VII Does Not Mean It Should Be So Interpreted in Section 704(a).

Petitioner additionally cites to a number of Title VII provisions where the term "employee" must be construed to include former employees as well as current employees, and argues that the term should similarly be construed in Section 704(a). Petitioner's argument falls far short of the mark. Those provisions, unlike the one *sub judice*, could be said to fall within one of the exceptions to the plain

meaning doctrine, namely, whether a literal meaning of the term "employee" would lead to grossly absurd results or would be at odds with the demonstrable and "clearly expressed" intention of the legislative body. *See United States v. Ron Pair Enters., Inc.* 489 U.S. at 242; *Russello v. United States*, 464 U.S. 16, 20 (1983).

Thus, Petitioner notes that the term "employee" is used in nine instances in Title VII where the term "clearly encompass former employees." Pet. Br. at 14. For example, Section 717(b)(3) provides that the EEOC is to give notice of its final agency action to "an employee or applicant for employment," even to those who were unlawfully terminated, and thus, formerly employed. Similarly, Sections 706(g)(1) and 717(b), authorizing "reinstatement. . . of employees" as remedies, would not make sense if former employees were not included because the term "reinstatement" presupposes that the victim of discrimination was terminated from employment. Amicus agrees that it would be an absurd reading of the term "employee" to exclude terminated employees from the right to receive the EEOC notice or to obtain reinstatement.

Furthermore, it should be noted that the provisions cited by Petitioner are generally concerned with the procedural rights and remedies that accrue as a result of discrimination that occurred while the (former) employee was actually employed. In this case, however, the allegedly prohibited act occurred after the employment relationship ended. In addition, Section 704(a)'s prohibition of retaliation is not a procedural right or remedy; rather, employers have a substantive duty not to discriminate against their employees or applicants for employment because of their participation in Title VII

proceedings, whether as a claimant or witness.[3] It does not lead to absurd results to exclude former employees from that coverage; consequently, there is no justification to expand the plain meaning of the term "employee" as one who is currently employed by an employer to include former employees.

Petitioner's arguments, similar to those of the dissenting opinion below as to why the term should be extended in scope, is not one of definitional absurdity, but one of perceived unfairness. Those policy arguments, however, are best left for the legislative branch rather than the judicial forum; otherwise the courts would be legislating on a case-by-case basis. [4]

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[3] The fact that employers may be subject to punitive damages for discriminatory conduct under 42 U.S.C. § 1981a is yet another reason why "employee" should be interpreted narrowly. The rule of narrow construction, similar to the rule of lenity, requires statutory provisions imposing penalties to be strictly construed. *Commissioner v. Acker*, 361 U.S. 87 (1959); *Gold Kist, Inc. v. U.S. Dep't of Agriculture*, 741 F.2d 344, 347-49 (11th Cir. 1984). Punitive damages are by definition penal rather than compensatory in nature.

[4] Our laws, including civil rights laws, are replete with line-drawing policy decisions, such as the number of employees required to trigger Title VII coverage, or the time period in the statute of limitations within which to bring a claim under Title VII's provisions. In either of these situations, one employee too few, or one day too many, could lead to a seemingly unfair result. *See, e.g., Mohasco Corp. v. Silver*, 447 U.S. 807 (1980), where Justice Stevens, writing for the Court, gave a literal reading to the word "filed" with respect to the filing

(continued...)

II. THERE ARE COMPELLING POLICY REASONS WHY SECTION 704(a) SHOULD NOT BE INTERPRETED TO ENCOMPASS FORMER EMPLOYEES.

While amicus submits that the term "employees" in Section 704(a) does not include former employees under normal rules of statutory construction, there are also several policy reasons why Petitioner's broad reading of that term should be rejected.

A. The Inclusion of Former Employees Under Section 704(a) Will Create Confusion Among Employers with Respect to Their Title VII Liability and Permit Double Recovery for Aggrieved Individuals.

Holding former employees applicable under Section 704(a) will cause great confusion among employers with respect to their Title VII liability. Since a prospective employer is already liable under Section 704(a) for retaliating against an applicant who has availed himself of Title VII protections, see 42 U.S.C. §2000e-3(a), it would be confusing for a former employer to be likewise liable

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[4](...continued)
requirements of Title VII. In doing so, this Court rejected a *pro se* discrimination complaint as untimely filed even though the lower court's equitable interpretation of "filed" would be more faithful to the "strong federal policy of insuring that employment discrimination is redressed." *Id.* at 813. *See also United States v. Perdue Farms, Inc.*, 680 F.2d 277, 285 (2d Cir. 1982) (literal reading of environmental statute must be followed and "inequitable" results or "alleged drafting error[s] are for Congress, not the courts, to resolve").

for the same individual. If former employees were also covered under Section 704(a), courts would have difficulty determining when and whether a former employer or a prospective employer is liable to the applicant.

For example, how will a court determine employer liability under Section 704(a) where an applicant who filed an EEOC claim has two former employers -- both of whom gave the applicant negative employment references -- and the prospective employer in bad faith relies on these two recommendations in refusing to offer the applicant a job? Extending Section 704(a) to include former employees could potentially provide a plaintiff with double remedies.[5]

Conversely, under the court of appeals decision below, only the prospective employer would be liable to the plaintiff. Adhering to the plain language of the statute, in which Section 704(a) specifically protects "applicants for employment," the court below maintains the working balance between employers and employees in the employment relationship. Holding that Section 704(a) includes former employees, however, will result in confusion among courts and employers with respect to their Title VII liability.[6]

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[5] Petitioner's amici readily admits the likelihood of double recovery if former employees are covered under Section 704(a). *See* Brief of The Lawyers' Committee for Civil Rights Under Law, et al., at 13-14 (Fourth Circuit's reading of Section 704(a) "would immunize company 'X' for providing a retaliatory bad reference but penalize company 'Y' for acting on it, when both knew it to be false and retaliatory!").

[6] For example, assume that a company has 15 employees
(continued...)

B. Petitioner's Claim Is More Appropriately Litigated under State Tort or Contract Law.

Petitioner's retaliation claim is more appropriately litigated as a defamation or contract claim under State law rather than as a federal claim under Title VII. "Title VII is not a 'bad acts' statute." *Holder v. City of Raleigh*, 867 F.2d 823, 828 (4th Cir. 1989).

In an analogous case, a federal district court held that a blacklisting of a former employee by a former employer was not discrimination under Title VII. *Ferguson v. Mobil Oil Corp.*, 443 F. Supp. 1334 (S.D.N.Y. 1978), *aff'd without opinion*, 607 F.2d 995 (2d Cir. 1979). The district court reasoned, "[A]lthough such behavior is obviously reprehensible and probably tortious, it is clearly not discriminatory. Rather, it would appear more closely analogized to state law claims of 'slander' and 'tortious

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[6](...continued)
and discharges one of them who later files a Title VII discriminatory discharge complaint. The company now has only 14 employees and soon thereafter ceases to be a covered "employer" as that term is defined in 42 U.S.C. 2000e(b) because it has less than 15 employees. If, as in this case, that employer subsequently provides a poor performance rating for the discharged employee to a future employer, does that mean that the employer remains liable under Title VII for acts committed *after* it ceased to be a statutorily defined employer with respect to the former employee? Petitioner's argument would thus lead to confusing and bizarre situations where a company is both covered and not covered by Title VII at the same time.

interference' with an employment relationship." *Id.* at 1339.

Even though Title VII's Section 704(a) was enacted after the *Ferguson* decision, the *Ferguson* rationale is still valid. Robinson could have sued Shell Oil Co. for defamation or for tortious interference with a prospective employment relationship.[7] Unlike Title VII claims, Robinson's tort claims would not be limited to traditional equitable relief. *See* 42 U.S.C. § 2000e-5(g); *Albermale Paper Co. v. Moody*, 422 U.S. 405, 421 (1975). *But see* 42 U.S.C. § 1981a (allowing for punitive damages). Furthermore, under state tort law, the statute of limitations provide an aggrieved person is much longer period than the usual 180-day limitation available to plaintiffs to file Title VII claims. *See* 42 U.S.C. § 2000e-5(e). This is a tort claim wrongly litigated as a Title VII claim.

Petitioner's claim that a refusal to include former employees under Section 704(a) would deter employees from filing EEOC complaints is grossly exaggerated. Had tort or contract law remedies been unavailable to aggrieved

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[7] State law jurisprudence generally recognizes the importance to society that future employers should be able to solicit and receive candid performance evaluations of applicants from their former employees. Accordingly, in Texas, where the respondent is located, and in Maryland, where the petitioner resides, employers generally enjoy a qualified privilege for such statements. *See, e.g., Holley v. Smith*, 827 S.W. 2d 433 (Tex. Ct. App. 1992); *Marchesi v. Franchino*, 243 A.2d 533 (Md. 1978). The qualified privilege is lost, however, if the former employee can show malice on the part of the former employer. Thus, if the employer was motivated by racial or other discriminatory animus in providing false poor performance evaluations, that would certainly constitute the requisite malice.

former employees, petitioner's claim may have some merit. However, since Petitioner does have the option to sue for defamation, breach of contract, or tortious interference, the Court's refusal to extend Section 704(a) to former employees would not result in wholesale retaliatory behavior immune from judicial review.[8] On the other hand, if the Court holds that former employees are included under Section 704(a) protection, former employees will be able to manipulate employers into supplying positive recommendations when in fact good references are unwarranted. Such undeserved recommendations harm the new employer and the economy as a whole by allowing sub-standard work performance to continue in the marketplace.

C. The Courts Will Have Difficulty Determining Liability and Fashioning Equitable Remedies Under Section 704(a) For Former Employees.

In retaliation claims brought by former employees, amicus submits that it would be speculative to conclude that but for a former employee's negative recommendation the applicant/former employee would have been hired by the prospective employer. In addition, equitable remedies are ill-suited for this conduct.

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[8] In addition to remedies under tort and contract law, petitioner may also have remedies under a State's anti-discrimination law. *See, e.g.*, Tex. Lab. Code § 21.005 (Vernon Supp. 1996) ("An employer. . . commits an unlawful employment practice if the employer . . . retaliates or discriminates against a *person* who. . . files a complaint. . . or testifies, assists, or participates in any manner in an investigation, proceeding, or hearing.") (emphasis added).

Several factors are often considered by an employer when making a hiring decision -- education, experience, interpersonal skills, analytical ability -- to name a few. An employer's reference is only one of many factors considered when hiring an applicant. If Section 704(a) were to apply to former employees, a former employee would be required to demonstrate that but for the poor reference, she would have received one of the jobs she was seeking. *Polsby*, 970 F.2d at 1366; *Sherman v. Burke Contracting, Inc.* 891 F.2d 1527, 1538 (11th Cir.), *cert. denied*, 498 U.S. 943 (1990). Employment from prospective employers, however, is often no more than a good possibility, but by no means a certainty.

While relief must be in the form of making the former employee whole, the equitable means provided under Title VII to accomplish this goal are lacking. *Polsby*, 970 F.2d at 1366. Thus, because an employer considers many factors in its hiring process, and an employment reference is only one of those factors considered, it would be speculative for the courts to provide equitable remediation to the prospective employee under Section 704(a). As the *Polsby* court accurately noted:

> [I]t is much more difficult to fashion equitable relief for a former employee who was the victim of post-employment retaliation. While relief must be in the form of making the former employee whole as if the retaliatory act had not occurred, the equitable means to accomplish this goal are lacking. Such relief would entail calculating future damages and is far too speculative.

970 F.2d at 1366 (footnote omitted).

Accordingly, as a policy matter, retaliation claims by former employees are best adjudicated under state law, or under Title VII, but only against the prospective employer.

D. Extending Section 704(a) to Cover Former Employees Will Undermine the Integrity of a Good Employment Recommendation.

Many employees during the course of their employment career will participate in a Title VII proceeding in one form or another, either as a complainant or witness. To make employers liable for injuries to all former employees under Section 704(a) will cause employers to act in an unduly defensive manner when confronted by prospective employers seeking employment references from their applicants. With former employees covered under Section 704(a), employers will resort to giving a positive recommendation to former employees who have participated in a Title VII proceeding even when a negative reference is warranted. The result will be more positive recommendations provided by the employer to all former employees than would otherwise be warranted by their actual job performances.

This result does not promote the original purpose of Title VII. Rather, it creates a tilted employment market where the hard-working employees are indistinguishable from the less productive ones. Title VII was enacted to abolish racial, gender, color, creed, and national origin discrimination of employees by employers. An employee's previous job performance, however, is a legitimate and clearly relevant factor for prospective employers to consider when hiring. By extending Section 704(a) to

include former employees, an employers' ability to consider applicants' previous job performance for its hiring purposes would be seriously frustrated. Employers attempting to protect themselves from Section 704(a) liability will provide positive recommendations to these individuals irrespective of their merits. Knowing this to be the case, future employers will discount good employment references to the detriment of those industrious employees who truly deserve them.

CONCLUSION

For the foregoing reasons and those stated in Respondent's Brief, the judgment below should be affirmed.

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IN THE
Supreme Court of the United States
OCTOBER TERM, 1996

CHARLES T. ROBINSON, SR.,
Petitioner,
v.
SHELL OIL COMPANY,
Respondent.

On Writ of Certiorari to the
United States Court of Appeals
for the Fourth Circuit

BRIEF OF THE EQUAL EMPLOYMENT ADVISORY COUNCIL AS AMICUS CURIAE SUPPORTING RESPONDENT

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BRIEF OF THE EQUAL EMPLOYMENT ADVISORY COUNCIL AS AMICUS CURIAE SUPPORTING RESPONDENT

The Equal Employment Advisory Council respectfully submits this brief as *amicus curiae*.[1] The brief urges the Court to affirm the decision of the court of appeals and, thus, supports the position of the respondent, Shell Oil Company, before this Court.

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[1] Letters of consent from both parties have been filed with the Clerk of the Court.

INTEREST OF THE AMICUS CURIAE

The Equal Employment Advisory Council (EEAC) is an association of employers organized in 1976 to promote sound approaches to the elimination of employment discrimination. Its members include approximately 300 of the nation's largest corporations, as well as several industry associations that, in turn, have hundreds of corporate members. EEAC's directors and officers include many of industry's foremost experts in the field of equal employment opportunity. Their combined experience gives EEAC valuable insight into the practical, as well as legal, issues surrounding the proper interpretation and application of fair employment laws and policies.

EEAC's members, and the constituents of its association members, are all employers subject to Title VII of the Civil Rights Act of 1964, 42 U.S.C. § 2000e et seq., as well as other federal, state and local laws governing employment. As such, they stand to be affected by the Court's interpretation of Section 704(a) of Title VII, 42 U.S.C. § 2000e-3(a), in this case. The court below held that Section 704 (a)—which makes it unlawful for an employer to retaliate against "his employees or applicants for employment" for engaging in certain activities protected by Title VII—does not apply to actions taken against persons who have ceased to be employees of, and are not seeking employment with, the employer in question. A contrary reading of the statute would increase the exposure of employers, including EEAC's members, to charges and lawsuits under Title VII.

On a more general level, EEAC's members also have an ongoing interest in the care and precision with which legislators draft, and courts interpret, statutes

that regulate employment. Over the two decades of existence, EEAC has seen at close hand numerous instances in which imprecise drafting and overly expansive interpretation of statutory language have led to costly litigation that could have been avoided or curtailed, had legislators been more careful in their use of words or courts more faithful to their meaning. In this case, the petitioner urges the Court to hold that when Congress used the word "employees" in Section 704(a), it meant to include persons who have *ceased to be* employees, and that when Congress defined the term "employee" in Section 701(f) of Title VII, 42 U.S.C. § 2000e(f), as "an individual employed by an employer," it meant to include individuals who *no longer* are employed by an employer. Supreme Court approval of such contorted statutory interpretations would violate well-established canons of legislative interpretation. It also would abet the tendency of some lower courts, and many litigants, to treat statutory language as a ductile substance that, with ingenuity and determination, can be stretched and twisted to mean almost anything—including, in some instances, even the exact opposite of what it actually says. In EEAC's experience, that approach only leads to more litigation and greater uncertainty about the laws, including the employment laws that are of direct interest to EEAC's members.

Because of its interest in the application of the nation's fair employment laws, EEAC has, since its founding in 1976, filed more than 390 briefs as *amicus curiae* in cases before this Court, the United States Courts of Appeals, and various state supreme courts.[2] Thus, EEAC has an interest in, and a famil-

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[2] *E.g., West Virginia Univ. Hosps., Inc. v. Casey,* 499 U.S. 83 (1991); *Boureslan v. ARAMCO,* 499 U.S. 244 (1991);

iarity with, the issues and policy concerns presented in this case. Because of its significant experience in such matters, EEAC is well-situated to brief the Court on the importance of the issues beyond the immediate concerns of the parties.

STATEMENT OF THE CASE

Respondent Shell Oil Company terminated Petitioner Charles Robinson's employment in 1991. Robinson later filed a charge with the Equal Employment Opportunity Commission (EEOC) alleging that Shell had discriminated against him on the basis of race. Several months after the termination of his employment with Shell, Robinson applied for a job with another company. When the prospective employer contacted Shell, Shell gave him a negative reference, which Robinson attributes to his having an EEOC charge. Robinson then filed a second charge with EEOC, alleging that Shell had retaliated against him because of his filing of the first charge.

Robinson sued Shell under Section 704(a) of Title VII.[3] Shell moved to dismiss, arguing that, since Robinson was not employed by Shell at the time of the alleged retaliation, his claim was not covered by Section 704(a). The district court agreed, granted Shell's motion, and entered an order dismissing the case. Robinson then appealed to the Fourth Circuit.

Public Employees Retirement Sys. v. Betts, 492 U.S. 158 (1989).

[3] Robinson also filed a separate lawsuit concerning the termination of his employment with Shell. After trial in that case, the judge entered judgment in Shell's favor, finding that there was no evidence of race discrimination. Robinson did not appeal that judgment.

A panel of the court of appeals reversed, but on rehearing en banc, the Fourth Circuit affirmed the district court's holding that Section 704(a) does not cover retaliation against former employees.

SUMMARY OF ARGUMENT

The court of appeals correctly recognized that Section 704(a) of Title VII does not cover retaliation against a person who is neither an employee of, nor an applicant for employment with, the employer in question at the time the retaliation is alleged to have occurred. By its express terms, that section applies only to retaliation that is directed by an employer "against any of his employees or applicants for employment." 42 U.S.C. § 2000e-3(a). The plain meaning of the words "his employees" cannot be stretched to cover persons who no longer are employed by the employer in question. This conclusion is reinforced by the definitional section of Title VII, 42 U.S.C. § 2000e(f), which defines the term "employee" as "an individual employed by an employer," for it requires more than mere stretching to make that definition fit individuals who are *not* employed by an employer.

The wording of Section 704(a) differs significantly from that of Section 703(a), which sets forth Title VII's general ban on employment discrimination based on race, color, religion, sex or national origin. Section 703(a)(1) makes it unlawful for an employer "to fail or refuse to hire or to discharge *any individual*, or otherwise to discriminate against *any individual* with respect to [employment]" on the basis of any of those protected characteristics. 42 U.S.C. § 2000e-2(a) (emphasis added). Congress could have written Section 704(a) similarly broadly, to bar employers

from retaliating against any individual for filing a charge with the EEOC. But Congress chose instead to extend the protection of the anti-retaliation section only to "employees [and] applicants for employment." Congress having thus expressed its will in plain language, it is beyond the proper role of the federal courts to impose a broader ban against retaliation.

The Fourth Circuit's reading of Section 704(a) is fully in keeping with Title VII's purpose and remedial scheme. It affords persons currently employed protection against retaliation by their employers, and persons seeking employment protection against retaliation by *prospective* employers. It is not necessary that Title VII also afford persons who are not employed a remedy against possible retaliation by their *former* employers. Common law provides ample remedies against most forms of retaliation by former employers. For example, a company that provides false information in response to a reference check, or otherwise wrongfully interferes with a former employee's efforts to secure new employment, invites a civil suit for defamation, torious interference with contractual relations, and other possible claims. There is no need to stretch Title VII beyond the reach of its language to duplicate these civil remedies.

ARGUMENT

I. THE COURT OF APPEALS CORRECTLY HELD THAT SECTION 704(a) OF TITLE VII DOES NOT GIVE A FORMER EMPLOYEE A CAUSE OF ACTION FOR RETALIATION ALLEGED TO HAVE OCCURRED AFTER THE EMPLOYMENT RELATIONSHIP ENDED.

A. Introduction.

"When *I* use a word," Humpty Dumpty said, in a rather scornful tone, "it means just what I choose it to mean—neither more nor less."

"The question is," said Alice, "whether you can make words mean so many different things."

"The question is," said Humpty Dumpty, "which is to be the master—that's all."

Lewis Carroll, *Through the Looking-Glass*, 94 (1946).

Courts are not free to give words any meaning they choose to give them. Rather, as this Court has said "time and again," when it comes to construing statutory language, the "cardinal canon" is that "courts must presume that a legislature says in a statute what it means and means in a statute what it says." *Connecticut Nat'l Bank v. Germain*, 503 U.S. 249, 252 (1992), citing *United States v. Ron Pair Enters., Inc.*, 489 U.S. 235, 241-242 (1989), and *United States v. Goldenberg*, 168 U.S. 95, 102-103 (1897).

Section 704(a) of Title VII says, in plain language, that it is unlawful for an employer to retaliate against "his employees and applicants for employment." As the court of appeals correctly recognized, since these words are unambiguous, that ends the matter. For, in this situation, the "first canon is also

the last: 'judicial inquiry is complete.'" *Id.*, citing *Rubin v. United States*, 449 U.S. 424, 430 (1981), and *Ron Pair Enters., supra*, 489 U.S. at 241.

B. The Court of Appeals Correctly Recognized that the Phrase "His Employees" in Section 704(a) Unambiguously Denotes Individuals Who Are Employed by the Employer in Question, Not Those Who Are Not Employed.

Commonly known as Title VII's anti-retaliation provision, Section 704(a) says:

> It shall be an unlawful employment practice for an employer to discriminate against any of *his employees or applicants for employment* . . . because he has opposed any practice made an unlawful employment practice by [Title VII], or because he has made a charge, testified, assisted, or participated in any manner in an investigation, proceeding, or hearing under [Title VII].

42 U.S.C. § 2000e-3(a) (emphasis added). As the court of appeals correctly recognized, the words "his employees" in this provision unambiguously denote persons who currently are employed, not persons who once were employed but currently are not.

As the court of appeals observed, "[i]n examining statutory language, generally, words are given their common usage." (Pet. App. A-6, quoting from *United States v. Murphy*, 35 F.3d 143, 145 (4th Cir. 1994), *cert. denied*, 115 S.Ct. 954 (1995) (citing *K-Mart Corp. v. Cartier, Inc.*, 486 U.S. 281, 291 (1988)). The Fourth Circuit properly followed that maxim by giving the words "his employees" in Section 704(a) their ordinary meaning.

The Seventh Circuit recently observed in *Veprinsky v. Fluor Daniel, Inc.*, No. 95-2197, 1996, U.S. App.

LEXIS 15323 (7th Cir. June 26, 1996), that a literal reading of the term "his employees" as used in Section 704(a) does not include former employees.[4] As the Seventh Circuit declared in its opinion in that case:

> Because neither Section 704(a) nor the definition of "employee" [in 42 U.S.C. § 2000e(f)] expressly includes former employees, a literal reading of the statute would exclude them from coverage.

Id. at *8. One of the *amici* supporting the petitioner's cause similarly concedes that a "literal interpretation" or the word "employee" would exclude former employees. *Brief for National Employment Lawyers Ass'n as Amicus Curiae In Support of Petitioner* in *Robinson* at 5. The petitioner's own brief states more guardedly that the use of the term "employee" to refer to a former employee "might be characterized as 'colloquial.'" *Brief for Petitioner* at 13.

The petitioner and his *amici* refer to "literal interpretation" almost pejoratively. They portray their "colloquial" use of the word "employees" as superior to a literal one, because, they say, their version comports with "common usage." But the common usage of a word cannot so readily be separated from its literal meaning. "Literal" simply means "following or representing the exact words of the original," or

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[4] The court in that case went on, however, to reject a literal reading of Section 704(a) in favor of a reading that extends its coverage to former employees who have complained about "post-termination acts of retaliation that have a nexus to employment." *Id.* at *23. For the reasons set forth herein, it is submitted that the court in that case was incorrect in its ultimate holding that Section 704(a) should not be read literally.

"based on the actual words in their *ordinary meaning*; [as opposed to] figurative or symbolical." *Webster's New World Dictionary* 825 (2d College Ed. 1980) (emphasis added).

In pressing their strained contention that in common usage, the word "employees" includes former employees, the petitioner and his *amici* erroneously equate common usage with casual and imprecise usage. For example, the United States and the Equal Employment Opportunity Commission assert in their brief as *amici curiae*, that "[o]ne might say . . . 'the fire at the plant was set by a disgruntled employee' when referring to an employee who had recently been fired." *Brief for United States and EEOC as Amici Curiae Supporting Petitioner* in *Robinson* at 12. Perhaps so, but without more, a careful listener most likely would assume that the speaker was referring to a current employee.

The common usage of a term is better determined by reference to how it is likely to be understood by a careful listener than by how it might be misused by a careless speaker. Thus, in ascertaining the common usage of a word or phrase, it may be helpful to consider how a jury would interpret it if it were used in testimony. To build on the example offered by the government *amici*, suppose that, after the fire at the plant, a trial were held and a witness testified that the fire was set by an employee of the company. Without other information, jurors almost certainly would assume that the witness was referring to a current employee. Indeed, if it were brought out later that the witness knew, but failed to say, that the person had been discharged before setting the fire, the jurors probably would consider the witness' testimony less than forthright.

In reading legislation, it must be assumed that the drafters were at least trying to be clear and precise in their use of words. Thus, the use of the word "employees" in a statute, without any modifying or qualifying language, must be understood to refer to persons who *are* employed—not persons who *were* employed but are not any more. For if the drafters had wished to refer to persons who no longer are employed, they easily could have achieved clarity of expression by adding the adjective "former." Since Section 704(a) uses "employees" without "former" or any other modifier, the court of appeals clearly was correct concluding that the Section unambiguously refers only to current employees.

Title VII's definitional section is similarly unambiguous in denoting persons currently, rather than formerly, occupying employment relationships. It states simply that "[t]he term 'employee' means an individual *employed* by an *employer* . . . ." 42 U.S.C. § 2000e(f) (emphasis added). As the court of appeals observed:

> The term "employed" as used in subsection 2000e(f) is commonly used to mean 'performing work under an employer-employee relationship." *Black's Law Dictionary* 525 (6th ed. 1990). Certainly the term "employed" is not commonly used to mean "no longer performing work under an employer-employee relationship." Furthermore, "employer" as used in subsection 2000e(f) is commonly used to mean "one who employs the services of others." *Id.* Again, no meaningful argument can be made that the term "employer" is commonly used to mean "one who no longer employs the services of others."

Pet. App. at A-12.

It is quite true that subsection 2000e(f)'s definition of "employee" suffers from a circularity that renders it unhelpful in distinguishing employment relationships from other business arrangements, such as independent contractor relationships. *See Nationwide Mut. Ins. Co. v. Darden*, 503 U.S. 318, 323 (1992). But the circularity does not affect the definition's temporal frame of reference. The definition simply refers to persons "employed," not to persons "once employed," "formerly employed," or "ever employed."

Again, the petitioner and his *amici* are forced to resort to strained and unpersuasive arguments in contending that "employed" in this context refers to past, as well as present employment. To be sure, "employed" can be used in past constructions, as when it is coupled with a past tense verb (*e.g.*, "he *was* employed"). But when unaccompanied by any verb or modified with a temporal connotation, the term is commonly understood to refer to a present condition. For example, a questionnaire asking an employer to state the "number of persons employed" at its headquarters facility would commonly be understood to call for the number *presently* employed there, not the total number of persons *ever* employed at the facility.

Equally unpersuasive are the arguments of the petitioner and his *amici* that court opinions, other provisions of Title VII, and provisions of certain other statutes illustrate that the word "employees" is commonly used to encompass former, as well as current employees. Those arguments largely beg the question that is before the Court in this case. For the most part, too, they refer to statutory provisions that are significantly different from Section 704(a). For example, the government *amici* argue that former employees are encompassed in the term "employees" as used in Section 706(g)(1) of Title VII, 42 U.S.C. § 2000e-5(g)(1), which provides that a court may order "reinstatement or hiring of employees." *Brief* at 10. But that remedial provision contemplates situations in which a court has found that the individuals in question are legally entitled to current employment. In those circumstances, it is entirely logical to refer them as "employees." In the present case, in contrast, the petitioner seeks to expand the meaning of "employees" to include persons who, at the time of the alleged unlawful conduct, neither held current employment nor had any legal entitlement to current employment with the employer in question.[6]

Similarly misplaced is the reliance of the petitioners and their *amici* on dicta in this Court's opinion in *Allied Chem. & Alkali Workers of America v. Pittsburgh Plate Glass Co.*, 404 U.S. 157 (1971). The basic holding of that case is that the term "employee" in the National Labor Relations Act (NLRA) does not encompass retirees, because retirees have ceased to work for another for hire. *Id.* at 168. In dicta, the Court opined that the term "employee" in the NLRA could include "persons who have quit or whose employers have gone out of business," because such persons are still "members of the active work force available for hire and at least in that sense could be

[6] Similarly misplaced is the government *amici's* reliance (*Brief* at 12-13) on decisions in which this Court has referred to individuals no longer able to work as "disabled employees." *E.g., Richardson v. Belcher*, 404 U.S. 78, 81 (1971). That phraseology is merely a convenient way of differentiating persons disabled by, or as a result of, employment from those disabled in other respects.

identified as 'employees.'" *Id.* But in offering these views, the Court was interpreting the NLRA's definitions of "employee," which differs materially from Title VII's definition. The NLRA's definition states:

> The term "employee" shall include any employee, and *shall not be limited to employees of a particular employer*, unless this subchapter explicitly states otherwise, *and shall include any individual whose work has ceased* as a consequence of, or in connection with, any current labor dispute or because of any unfair labor practice, and who has not obtained other regular and substantially equivalent employment. . . .

29 U.S.C. § 152(3) (emphasis added). In contrast, Title VII's definition of "employee" contains none of the expansive language of the NLRA definition italicized above.

Moreover, Section 704(a) of Title VII specifically applies only to actions of an employer directed against "*his* employees"—*i.e.*, employees of the particular employer alleged to have committed the acts of retaliation. Thus, the *Pittsburgh Plate Glass* Court's focus on whether the individuals in question are available for hire by *any* employer clearly relates an element of the NLRA definition of "employee" that has no counterpart in the Title VII definition. Reference to the NLRA definition of "employee" does, however, demonstrate that Congress knows how to write a definition that clearly includes persons other than current employees of a particular employer when it wishes to do so.

That Congress intended the word "employees" in Section 704(a) to refer only to present employees is further confirmed by the fact that Congress took

pains to use separate terminology to ban retaliation against "applicants for employment." As the court of appeals recognized, the addition of the phrase "applicants for employment" would not have been necessary if "employees" had no temporal element. Pet. App. at A-13.

C. Congress' Choice of the Phrase "His Employees and Applicants for Employment" in Section 704(a), In Contrast to Its Use of "Any Individual" in Section 703(a)(1), Further Indicates an Intent to Give the Anti-Retaliation Section Less Inclusive Coverage.

Significantly, while Congress directed Title VII's protection against retaliation in Section 704(a) solely to "employees and applicants for employment," it structured the statute's general ban on employment discrimination more broadly. Section 703(a) declares it an unlawful employment practice for an employer—

> (1) to fail or refuse to hire or to discharge *any individual*, or otherwise to discriminate against *any individual* with respect to compensation, terms, conditions, or privileges of employment, because of such individual's race, color, religion, sex, or national origin; or
>
> (2) to limit, segregate, or classify *his employees or applicants for employment* in any way which would deprive or tend to deprive any individual of employment opportunities or otherwise adversely affect his status as an employee, because of such individual's race, color, religion, sex, or national origin.

42 U.S.C. § 2000e-2(a) (emphasis added).

Thus, Congress carefully distinguished in Section 703(a) between a broad range of discriminatory ac-

tions, described in subsection (1), which it made unlawful when directed by an employer against *any individual*, and certain specific activities described in subsection (2), which it made unlawful only when directed by an employer against *its own employees or applicants* for employment. The nature of the actions proscribed by subsection (2)—*i.e.*, limiting, segregating, and classifying—indicates that that section is addressed only to conduct directed at current employees or applicants, not former employees, because an employer ordinarily would be in no position to "limit, segregate, or classify" former employees or "otherwise adversely affect [their] status as employees." Indeed, we are aware of no case in which Section 703(a)(2) ever has been applied to *former* employees.

In describing the class of individuals protected against retaliation under Title VII, Congress could have patterned Section 704(a) after Section 703(a)(1), thus making it unlawful for an employer to retaliate against "any individual" for opposing conduct made unlawful under Title VII or for filing charges with the EEOC or otherwise participating in proceedings under Title VII. Significantly, however, Congress chose instead to pattern the description of the class protected against retaliation under Section 704(a) more narrowly, adopting the same phraseology as it used in Section 703(a)(2)—*i.e.*, "his employees or applicants for employment." The choice of this more limited language in both 703(a)(2) and 704(a) provides additional evidence that Congress intended the latter section to proscribe retaliation only when directed against a certain, limited class of individuals—*i.e.*, those currently holding or seeking employment with the employer in question.

II. THE COURT OF APPEALS' READING OF SECTION 704(a) IS FULLY CONSISTENT WITH TITLE VII'S PURPOSE AND REMEDIAL SCHEME.

This Court has held repeatedly that the literal terms of a statute may be overridden by courts only in "rare and exceptional circumstances" when a literal application would lead to "an absurdity . . . so gross as to shock the general moral or common sense." *Crooks v. Harrelson*, 282 U.S. 55, 59 (1930); and *see Griffin v. Oceanic Contractors, Inc.*, 458 U.S. 564, 574 (1982). Contrary to the arguments of the petitioner and his *amici*, the court of appeals' straightforward reading of Section 704(a) in this case does not lead to an absurd result or to one that is at odds with the purpose and remedial scheme of Title VII.

Instead, as read and applied by the court of appeals, Section 704(a) is fully consistent with Title VII's purpose and supportive of its remedial scheme. It affords individuals a remedy when they are retaliated against by their current employer for having filed a charge with the EEOC or engaged in other activity protected by Title VII. It also affords individuals a remedy when they are discriminated against by a prospective employer for having filed a charge or engaged in other activity protected under the statute. Thus, as read by the court below, Section 704(a) does nothing destructive of the ends Title VII was enacted to accomplish. Quite the contrary, it helps to ensure that those ends are not thwarted by retaliation by either current or prospective employers. That the section does not reach every other possible form of retaliation does not render it either absurd or contrary to the statutory purpose.

About the only way in which an employer can discriminate against a former employee (other than one

seeking re-employment) is by interfering with the person's ability to secure or retain employment with others. But employers today are well aware that the common law prohibits wrongful interference with individuals' efforts to secure employment and affords ample civil remedies to those subjected to such conduct. Fear of civil suits for defamation has caused many employers to adopt strict policies of not responding to reference checks on former employees, or of merely confirming dates of employment and positions held but not disclosing any information regarding the individual's job performance, conduct, or reason for termination of employment. Employers also are well aware that "blacklisting" of former employees or pressuring other employers not to hire them can lead to liability for civil conspiracy, tortious interference with contractual relations, and other violations of common law.

Accordingly, there is no danger that affirmance of the decision below will lead to widespread retaliation by employers against former employees, or leave them without protection if they oppose practices made unlawful by Title VII, file charges with the EEOC, or otherwise participate in proceedings under Title VII. Nor is there any need to duplicate the existing civil remedies already available to such individuals by extending the protection of Section 704(a) beyond persons who are "employees and applicants for employment" as those terms are commonly understood.

CONCLUSION

For the foregoing reasons, the Equal Employment Advisory Council urges that the decision of the court of appeals be affirmed.

Respectfully submitted,

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